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*Aug 9*  
**REPORTS**

**OF**

**CASES**

**ADJUDGED IN**

**THE SUPREME COURT**

**OF**

**PENNSYLVANIA.**

---

**BY**

**WILLIAM RAWLE, Jun. CHARLES B. PENROSE and  
FREDERICK WATTS, Counsellors at Law.**

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**VOL. I.**

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**HARRISBURG:**

**PRINTED BY WELSH & MILLER.**

.....  
**1830.**

*Eastern District of Pennsylvania, to wit:*

**BE IT REMEMBERED**, That on the twenty-ninth day of May, in the fifty-fourth year of the independence of the United States of America, A. D. 1830, William Rawle, Jun. Charles B. Penrose, and Frederick Watts, of the said district, have deposited in this office the title of a book, the right whereof they claim as authors, in the words following, to wit:

"Reports of Cases adjudged in the Supreme Court of Pennsylvania. By William Rawle, Jun. Charles B. Penrose, and Frederick Watts, Counsellors at Law. Vol. I."

In conformity to the act of the Congress of the United States, entitled, "An act for the encouragement of learning, by securing the copies of Maps, Charts, and Books, to the authors and proprietors of such copies, during the times therein mentioned;" and also to the act, entitled "An act supplementary to an Act, entitled An act for the encouragement of learning, by securing the copies of Maps, Charts and Books to the authors and proprietors of such copies during the times therein mentioned, and extending the benefits thereof to the arts of Designing, Engraving, and Etching Historical and other prints."

D. CALDWELL,

*Clerk of the Eastern District of Pennsylvania.*

*Rec. Dec. 29, 1883*

# JUDGES

OF THE

## SUPREME COURT OF PENNSYLVANIA.

---

JOHN B. GIBSON, Esq. Chief Justice.

MOLTON C. ROGERS, Esq.

CHARLES HUSTON, Esq.

FREDERICK SMITH, Esq.

JOHN TOD, Esq.

JOHN ROSS, Esq. (appointed the  
16th of April, 1830, in the place  
of JOHN TOD, Esq. deceased.)

} Justices.

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## ATTORNEY GENERAL,

SAMUEL DOUGLAS, (appointed February, 1830.)





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**CASES**  
IN  
**THE SUPREME COURT**  
OF  
**PENNSYLVANIA.**

---

WESTERN DISTRICT—SEPTEMBER TERM, 1829.

---

**JOHN SMAY** *against* **CHARLES SMITH** and **BENJAMIN R. MORGAN**, Executors of **WILLIAM SMITH, D. D.**

IN ERROR.

When it can be proved or is admitted that a man acted as an assistant surveyor, it is not requisite to shew a special authority.

General reputation that a person was employed as such, or proof that many drafts or field notes remaining in the Surveyor's office are in his hand writing, are evidence that he was an assistant.

The return by a deputy surveyor of a survey made by another, is a ratification of it, and it is immaterial whether there was a precedent authority to make it or not.

An ejectment may, in some cases be supported on a warrant without a survey. In ejectment to recover a tract of land, where reference is made in a deposition to lines run and surveys made, and a draft is annexed, which does not embrace all those lines and surveys, but only those of the tract in dispute, it will be sufficient, if the defendant was present to cross examine, and did not ask for any other or further draft.

**ERROR** to the court of common pleas of Cambria county.

This was an ejectment brought in the court below by the executors of *Dr. Smith* to recover from *John Smay*, the defendant, part of a tract of two hundred acres of land in Cambria county. To support their claim, the plaintiffs gave in evidence,

1st. A warrant to *William Smith, D. D.* dated 7th April, 1792, for one hundred acres near the 13th mile tree on the road from Frankstown, including the Dollar Camp.

2d. A warrant to *Rebecca Blodget*, (a daughter of *Dr. Smith*), dated 21st December, 1792, for three hundred acres adjoining lands, warranted to *William Smith, D. D.* at a place called the Dollar Camp.

The plaintiffs then offered the deposition of *Thomas Vickroy*, which went to shew, that in 1794 he went and saw the outlines of the survey, as made by *William O'Keefe*, deputy surveyor, in 1806, and many other surveys for *Dr. Smith*, as run by *P. Cassidy*. That *Vickroy* himself at the instance of *Dr. Smith*, at different times run the division lines, and particularly run and marked all the lines of the said survey of *O'Keefe*, (a draft of which, shewing the courses and distances and corners he annexed to his deposition,) that hav-

(John Smay v. Charles Smith and Benjamin R. Morgan, Executors of William Smith, D. D.)

ing completed all the work, he in 1808, gave his field notes and draft to Mr. *O'Keefe*, who returned the surveys for Dr. *Smith*. That the said survey included the thirteenth mile tree on a road from Frankstown to Conemaugh, and the Dollar Camp, a place so called, and well known.

A cross examination of the deponent was attached to the deposition. The defendant objected to its admission. That it was not proved that *P. Cassidy* was an assistant of *G. Woods* the deputy surveyor. That it was not proved that *Thomas Vickroy* was an assistant of *G. Woods*. That he was not an assistant of *O'Keefe*. That the land was not in *G. Woods'* district. That *Vickroy* did not return with his deposition a draft of all the work done by *P. Cassidy* and himself. And that if *Vickroy* had no authority to make the survey it was useless to prove the existence of the lines on the ground. Which objections were overruled by the court, and a bill of exceptions sealed.

Other witnesses were then produced on the part of plaintiffs, who proved that they had examined the lines on the ground, and found the survey accurately made, and the defendant living within it.

The plaintiff then offered a certified copy of the survey by *William O'Keefe*.

To which it was objected, that the certificate at the foot of the draft returned, stated the above to be a copy of a survey made in 1794, by *G. Woods, &c.* and examined and resurveyed in 1808, by *William O'Keefe*, deputy surveyor—and that part of the certificate which states what *G. Woods* did, is no evidence of the fact; and in support of their objection produced a witness who swore, that he had seen and conversed with *William O'Keefe*, on the morning of the trial, and that he lived within a mile and a quarter of the town. Whereupon the court rejected the draft. The plaintiffs, after giving in evidence the will of Dr. *Smith*, dated 10th July, 1802, rested.

The defendant produced no other testimony than to show that the "Dollar Camp," was without the lines claimed by the plaintiffs, and relied on the defectiveness of the defendant's title to prevent a recovery.

The opinion of the court was reduced to writing, and filed of record. *White*, for plaintiff in error, contended,

1st. That the deposition of *Vickroy* was erroneously admitted, because it referred to a draft which had been in his possession, and did not account for the loss of it; and although he did swear the copy annexed was true, that that was not sufficient. *Lessee of Packer v. Gonsoules*, 1 Serg. & Rawle, 526. 13 Serg. & Rawle, 113.

2d. That the warrant to Dr. *Smith* is but descriptive to a common intent, and the title would only attach from the actual survey, but if it were descriptive, the holder is postponed by laches. *Hunter's Lessee v. Meason, et al*, 4 Yeates, 108. 3 Yeates, 25. 7 Serg. & Rawle, 185. 191. 4: Bin, 59. 3 Yeates, 283. 2 Yeates, 148.

(John Smay v. Charles Smith, and Benjamin R. Morgan, Executors of William Smith, D. D.)

3d. As the plaintiffs have no official survey they cannot recover. 2 *Yeates*, 148. 3 *Bin.* 103.

4th. That the defendant could not be affected with notice unless there was an official survey. An illegal survey is not notice. 7 *Serg. & Rawle*, 191. 2 *Bin.* 105—7. *Smith's Ex'r v. Keehan*, MS. case. *Smith*, for defendant in error.

The warrants were descriptive, as appears by the finding of the jury—they had both been placed in the hands of *P. Cassidy*, an assistant of the deputy surveyor, *Thomas Vickroy* also had run lines, and made a draft, which he gave to *O'Keefe*, the deputy surveyor, who returned the survey into the office.

The opinion of the court was delivered by

HUSTON, J.—The executors of *Dr. Smith*, who were plaintiffs in the common pleas, claimed the land in question on two warrants unsurveyed and returned into the office of the Surveyor General. One in the name of *Dr. Smith*, dated the 7th April, 1792, for one hundred acres of land near the the thirteenth mile tree, on the road from Frankstown, including the "Dollar Camp;" another in the name of *Rebecca Blodget*, (a daughter of *Dr. Smith*), dated the 21st of December, 1792, for three hundred acres, adjoining land warranted to *William Smith*, D. D. at a place called the "Dollar Camp." After giving in evidence these two warrants, the plaintiff offered the deposition of *Thomas Vickroy*, which was received and exception taken, then the testimony of *S. Lloyd*, which was admitted, and then the return of the survey by *William O'Keefe*, deputy surveyor, under seal of office, which was rejected, because as was agreed here, the certificate at the foot of the draft returned, stated the above to be a copy of a survey, made in 1794, by *G. Woods, &c.* and examined and surveyed by *William O'Keefe*, deputy surveyor, in 1808, and that the part of the certificate which states what *G. Woods* had done, was no evidence of the fact stated. Be it so—it was still evidence of what was done by the deputy surveyor who returned it, and should have been received as evidence of a survey in 1809—this being rejected the defendant gave no evidence—it had been proved he was in possession, and the court charged the jury that they might find for the plaintiff; they did so, and *Smay* has brought this writ of error.

There is in the objections an over acuteness, not usual in our courts, and which I shall proceed to state.

*Vickroy's* deposition proved that in 1794, he went and saw the outlines of the survey in question, and many other surveys for *Dr. Smith*, as run by *P. Cassidy*. That *Vickroy* himself, at the instance of *Dr. Smith*, at different times run the division lines, and particularly run and marked all the lines of the surveys in question, (a draft of which, shewing the courses, distances and corners, he annexed to his deposition,) that having completed all the work, he



(John Smay v. Charles Smith and Benjamin R. Morgan, Executors of William Smith, D. D.)

in 1808 gave his field notes and drafts to Mr. *O'Keefe*, who returned the surveys. *Lloyd* and others proved that shortly before the trial they examined the lines on the ground, and found the survey accurately made, and the defendant living within it. *Vickroy* and others proved the thirteenth mile tree on a road from Frankstown to Conemaugh, and the "Dollar Camp," a place so called and well known, to be included in the plaintiff's survey. There was a cross examination at the time of taking the deposition. The objections to it were, that it was not proved that *P. Cassidy* was an assistant of *G. Woods*. That it was not proved that *Thomas Vickroy*, the witness, was an assistant of *G. Woods*. That he was not an assistant of *O'Keefe's*. That the land was not in *O'Keefe's* district. And that *Vickroy* did not return with his deposition a draft of all the work done by *P. Cassidy* and himself. And next that if *Vickroy* had no authority to make the survey, it was useless to prove the existence of the lines on the ground, by *Lloyd* and others.

There is a rule of evidence that a party shall produce the best evidence which the case admits of. In practice, however, there are very many exceptions. Where a deed is acknowledged, or a deposition taken before a man who states himself to be a justice of the peace, the deed is recorded or read in court, and so is a deposition, though we have not the best evidence, or any evidence that the man who certified it was a justice of the peace. Copies of the returns of surveys under seal for the Surveyor General's office, are and have been received, and the commission of the deputy surveyor who made them is not asked for, any more than the justices of the peace above stated. The boundaries of a surveyor's district are also taken from report, as well as the fact of his being a deputy surveyor, if either is contested, notice is given before the trial, or the party contesting the authority, comes with a copy of the commission to some other person, and with proof that the land was actually out of the district. So the commission of a sheriff, or proof that the writ was executed within his county is not required—if denied, the truth may be enquired into. The sheriff and deputy surveyor generally have assistants, and the authority to the deputy sheriff, or assistant to the surveyor, is scarcely ever in writing, I will say never where the person is generally employed. If a man who has never been engaged to make a survey for the officer, is wanted to make a single survey, he may be requested in writing. In some instances there are several persons who act as assistants to the deputy surveyor, and when they continue to act in that capacity for a long time, this is as generally known as it is known who is the deputy surveyor of the county.

Where it can be proved or is admitted that a man acted as an assistant surveyor, and the survey is returned, as was the case here, it never was required to prove a special authority to do that act. General reputation that a man acted as an assistant to a former

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deputy surveyor, or proof that many drafts or field notes remaining in the office are in the hand-writing of a particular man, are evidence that he was an assistant. In 7 *Serg. & Rawle*, 317, the law is not laid down, but rather what has been the usage on this subject: and see 6 *Serg. & Rawle*, 137. Perhaps every man in that court house knew that *G. Woods* was the deputy surveyor of Bedford county, in 1792, and that the prescpt county of Cambria was a part of that county in the same year. It was as well known thirty years ago that *Cassidy* and *Vickroy* had been assistants of *G. Woods*, as that *G. Woods* had been deputy surveyor of Bedford county. If *Vickroy* had said in his deposition that he and *Cassidy* had been assistants to *G. Woods*, it would have been legal evidence of it; so if any person in the court had proved that they were known and reputed as such. Palpably the deposition was taken without a question on this subject, because it was supposed to be too well known to be denied. If it had been necessary in the cause I would have directed the jury that they might fairly infer it from the testimony given. *Vickroy* also proved that he gave to *O'Keefe* the drafts, &c. from which the return was made—now the fact that *O'Keefe* returned a survey made by *Vickroy*, or any other person, was a ratification of it, and after this, it was totally immaterial whether there was a precedent authority to make it or not. There was then, unless contradicted, and if believed, evidence of the survey being legally made.

It would then seem unnecessary to discuss the point whether in any case or in this case, an ejectment can be supported on a warrant without a survey. Clearly there are cases where a man may bring an ejectment on a warrant without any survey of the same land, each a warrant of his own: the deputy surveyor makes the survey for one, the other enters a caveat, the board of property decides, as the deputy surveyor did, the other is not without his redress he may bring his ejectment, and recover the whole or a part of the land which is in dispute; the fifth section of the limitation act, of the 26th of March, 1785, in fact supposes an ejectment on a warrant on which no survey has been made. There was a radical mistake in rejecting the return of survey by *O'Keefe*, but this was in favour of the party who has taken the writ of error, he, however, says that prevented him from going into a full defence; he it so, we must take it as it appears to us. There was another objection namely, that *Vickroy* in his deposition spoke of lines run and surveys made by *Cassidy* and himself, and did not annex a draft of these lines or surveys, but he annexed a draft of the tract in question. It did not appear, nor is it alleged that any other part of the work was material—besides having closed his testimony, and annexed his draft, the defendant cross examined the deponent and did not ask for any other or further draft.

Judgment affirmed.

ELIZABETH CARLISLE and JOHN CARLISLE, *against*  
ADAM STITLER.

IN ERROR.

An entry is not necessary in any case in Pennsylvania, in order to enable the person who has title to recover the possession of lands.

Every owner is in possession until some person actually enters on him under an adverse claim, and the statute of limitations begins to run from the time actual adverse possession is taken only.

The disability of marriage cannot be added to the prior disability of infancy, to avoid the operation of the statute.

W. L. owned a tract of land containing two hundred and eighty-seven acres, under an application and survey, of which he never had actual possession, and died in 1784, leaving issue Elizabeth in her minority, who at the age of twenty, married J. C. in April, 1787. At the time of the death of W. L. all but eighty acres of the said tract was held adversely by C. S. under a younger title by improvement, warrant and survey, who in 1793, bought under another title the said eighty acres, and took possession, which was held by those claiming under him. J. C. intermarried with E., died in 1815, and to February term, 1818, the said E. C. brought ejectment. *Held*, that as to so much of the tract of which said C. S. had adverse possession at the death of W. L., the said E. his daughter, was barred by the statute of limitations, but that as to the eighty acres of which the said C. S. took adverse possession in 1793, she was not barred.

When the right to the eighty acres, descended to E. C. in law she acquired the possession, and the true construction of the act of limitations gives a feme covert the same time when adverse possession is taken of her lands while she is covert, as it would have given her if there had been adverse possession and the lands had descended to her when she was covert.

WRIT of error to the common pleas of Westmoreland county.  
*Foster*, for the plaintiff in error.

*Alexander*, for defendant in error.

The facts of the case are fully stated in the opinion of the court, which was delivered by

HUSTON, J.—This was an ejectment by *Adam Stiller* against *Elizabeth Carlisle*, who having died, her heirs were substituted defendants by consent.

The case was considered in the nature of a special verdict, either party to be at liberty to take a writ of error.

One *Michael Byerly* and another made an improvement and built a cabin, in 1773, and sold the right to *Conrad Stiller*, who moved to the land and lived on it until his death about 1796—in 1786, C. Stiller took out a warrant for three hundred acres, describing the land and paying interest from 1st March, 1772—the same year he got a survey made and returned containing three hundred and eight acres.

On the 25th July, 1769, *John Irvine* obtained an application No. 3668, for three hundred acres of land on Brush creek, at the mouth of Irvin's run, and about two miles below the mouth of Bunky run.

On the 12th April, 1790, a survey was made on this by *B. Lodge*, a deputy surveyor, of two hundred and eighty-seven acres, (this

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survey was in all respects the same as to courses, distances and corners, with another survey to be mentioned directly.)

In 1791, *John Irvine* got a patent, and in 1793 sold the land with warranty to *Conrad Stitler*. This latter survey interfered greatly with *Stitler's* survey on his warrant, only about eighty acres were clear of his own former survey on his warrant. *Stitler* and his family occupied the lands until 1811, and died; on a writ of partition, the land in question, being that part which did not interfere with *Stitler's* old survey, was allotted to *Adam Stitler*, one of the heirs of *Conrad Stitler*.

*Conrad Stitler* and his heirs were in possession of and claimed all the land embraced in both the surveys before mentioned and are yet in possession of the land embraced in said surveys, except the one fourth part of that part of the survey of *John Irvine*, which did not interfere with *Stitler's* old tract.

On the 25th July, 1769, *John Irvine*, Indian trader, (being the same man who entered the preceding application, No. 3668,) entered another application No. 3663, for three hundred acres on the waters of Brush creek, on the south west side of the new road, &c. On the 4th May, 1771, he sold this to *William Lyon* for twenty pounds by deed recorded in 1787.

On the 22d June, 1772, a survey was made of two hundred and eighty acres, and returned in October, 1772. This survey, I said before was the same afterwards taken in 1790, under the other application in the name of *John Irvine*.

*William Lyon* never was in actual possession of any part of the land—he died in 1784, leaving a son born in 1764, who died in 1817.

There was another son who died without issue, and intestate, and a daughter *Elizabeth Lyons*, born in 1767, and who married *John Carlisle* on the 16th April, 1787—*John Carlisle* died in 1815, and to February term, 1818, *Elizabeth Carlisle* brought an action of ejectment against the said *Adam Stitler* for the undivided fourth part of two hundred and eighty-seven acres contained within the survey of *John Irvine*, and she recovered an undivided fourth part of all that part of that survey which lay east of the survey in *Conrad Stitler's* name and judgment on the verdict in 1821:—and for that part within the survey of *Conrad Stitler*, verdict and judgment for defendant. *Elizabeth Carlisle* entered into possession of the part so recovered by her, and this suit is brought by *Adam Stitler*, to try again her right to that land.

It will be seen then, that her right descended to *Elizabeth Lyon*, in 1784, when she was an infant. That she married *John Carlisle* in April, 1787, being then aged about twenty years. That her husband lived until about 1815, and she brought her suit in 1818. It was contended that being a minor when these lands descended to her, allowing twenty-one years, and then ten years more on account of her infancy, which was all that in any case could be asked, the time (thirty-one years,) expired in the year 1815, and

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that her recovery in a suit brought in 1818, was against right. It is true that the disability of marriage cannot be added to the prior disability of infancy; nor can the infant child of a woman who dies covert, have a longer period than its mother would have had if she had survived her husband. That part of the claim which affected lands of which *Conrad Stitler* was in possession when *William Lyon* died, came within the principle; and it was rightly decided that as to *Stitler's* old survey, *Mrs. Carlisle* was barred. But the eighty acres, part of which is now in dispute, which was within the first survey, on application *John Irvine*, No. 3663—and which was included in the survey on application No. 3668, was not claimed or occupied by *Stitler*, until after 1792, when he bought it from *John Irvine*. The possession and the right of this part descended together to *Elizabeth Lyons*, and both right and possession continued in her until *Stitler* purchased from *Irvine*, and he being in actual possession, totally ignorant of any claim but his own, held for himself and adverse to all the world. At the time he acquired this possession and right, *Elizabeth* was a married woman. As to this part, of which she was not disseised until 1792 or 3, she being covert at that time, the statute did not run against her until her husband's death, and she brought her suit within three years from that time.

The act of the 26th March, 1715, says, "From henceforth no person shall make entry into any manors, lands, tenements or hereditaments, after the expiration of twenty-one years next after his, &c. right or title to the same first accrued." In this clause it is evident the writer did not know that an entry was not necessary in any case in Pennsylvania, in order to enable the person who had title to recover the possession of lands. It seems not to have been considered that *the possession, and the right, in all cases* descended or accrued together, unless there was an *adverse* possession at the time *the title vested*: and if adverse possession was taken afterwards, the twenty-one years began to run from the commencement of adverse possession: The next clause is more easily understood: "nor shall any person whatever have or maintain any writ of right, or any real or possessory writ or action, for any manor, lands, tenements or hereditaments, of the seisin and possession of him, her or themselves, his, her or their ancestor or predecessors, nor declare or allege any other seisin or possession of him, her or themselves, his, her or their ancestors or predecessors, than within twenty-one years next before such writ, action or suit, so hereafter to be sued, commenced or brought. But though it is easily understood, it is not because in the construction of it, any attention was paid to grammar, or any care shewn to avoid unnecessary, and in that place, unmeaning words:—but it shews clearly enough, that this statute does not effect a man who is in possession, I repeat, until some person actually enters on him, enters an adverse claim.

(Elizabeth Carlisle and John Carlisle v: Adam Stitler.)

The fourth section, containing the saving for infants, married women, &c. has the same inaccuracy as the first clause of the second section above mentioned, and would seem to make the statute run against infants, married women, &c. although they were themselves in possession. The truth is the statute was made to bar those out of possession, and who continued out of possession, and did not bring suit within the time prescribed for each. The law does not refer or apply to those in possession, except to protect them after certain prescribed periods. The second, third and fourth sections all suppose persons to be out of possession, and limit the periods within which they must bring suits, according to the age and situation of each: while in possession it has no application. Mrs. Carlisle then was in possession at the time this land descended to her—in possession when she married, and until 1773, when Stitler's adverse title and possession commenced—and the true construction of the act gives her the same time where adverse possession is taken of her lands while she is covert, as it would have given of her, if there had been adverse possession, and the lands had descended to her when she was covert.

Judgment for plaintiff in error.

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### WILLIAMSON against MITCHELL.

IN ERROR.

Upon an appeal from the judgment of a justice of the peace by the plaintiff, the bail entered into a recognizance, which was taken by the justice in these words, "J. W. bound in a sum to cover all costs," which was held to be void; and upon which there could be no recovery on a *scire facias* against the bail.

THE writ of error in this case was to the common pleas of Mercer county.

A judgment was rendered in a suit brought before a justice of the peace by Robert Lyon against John Mitchell, from which the plaintiff appealed, and John Williamson the defendant in the court below, and plaintiff in error in this suit, was his security, whose recognizance was taken by the justice in these words—"John Williamson bound in a sum certain to cover all costs, that plaintiff will prosecute this appeal with effect." This suit was a *scire facias* upon that recognizance, in which John Mitchell was plaintiff, and John Williamson defendant. The following is a copy of the writ which issued.

MERCER COUNTY, SCT.

The Commonwealth of Pennsylvania to the Sheriff of Mercer county,  
Greeting:

We command you, that you summon John Williamson, bail of Robert Lyon, to be and appear before our judges at Mercer, at our

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county court of common pleas, there so be held for said county, on the third Monday of November next, to shew cause why he should not pay the costs taxed, in the case wherein *Robert Lyon*, by *Joseph Lyon*, was plaintiff, and *John Mitchell* was defendant, and have you then, there, this writ. Witness the Hon. *Henry Shippen*, president of our said court, at Mercer the 26th of August, 1826.

WM. S. RANKIN, *Proth'y.*

The defendant plead—*nul tiel record and nil debet*—Replication—*habetur tale recordum*. Issue.

The plaintiff offered in evidence a transcript of an appeal from the judgment of *Alexander Dumars*, Esq. in a suit wherein *Robert Lyon* was plaintiff, and *John Mitchell* was defendant, dated the 1st December, 1823, on which transcript were the following words, "December 1st, 1823, an appeal applied for by *Joseph Lyon*—*John Williamson* bound in a sum to cover all costs, that plaintiff will prosecute this appeal with effect," which evidence was objected to by the defendant, and the court overruled the objections, and sealed a bill of exceptions.

The court was requested by the plaintiff's counsel, to charge the jury, that the recognizance upon which the writ issued was void, in consequence of its non-compliance with the act of Assembly, and that, therefore, there could be no recovery in this suit: which the court refused to do, but instructed the jury that the recognizance was valid, and the plaintiff had a right to recover.

Three errors were assigned in this court.

- 1st. The court erred in admitting the transcript in evidence.
- 2d. They erred in their charge to the jury.
- 3d. That there is no cause of action stated in the *scire facias*.

*Bredin* and *Banks* for plaintiff in error.

The transcript of the justice, although filed in the prothonotary's office, is not evidence. A justice has no seal by which his acts are authenticated; and his certificate that the transcript is truly copied from his docket, is not entitled to greater weight than the certificate of any other person not on oath to a fact within his knowledge. The evidence was nothing more than the allegation of the justice, that a recognizance had been entered into by *Williamson* before him.—*O'Donnel v. Seybert*, 13 *Serg. & Rawle*, 54.

The 5th section of the act of 1810, *Purd. Dig.* 452, provides the form in which the recognizance shall be taken, so far as respects the condition; but the recognizance upon which this suit is brought, does not contain an obligation certain in amount, nor does it contain the conditions required by the act, even substantially, which it ought to do in order to its validity. *Commonwealth v. Emery*, 2 *Bin.* 431. *Langs v. Galbreath*, 1 *Serg. & Rawle*, 491. *Bolton v. Robinson*, 13 *Serg. & Rawle*, 193. *King v. Culversen*, 10 *Serg. & Rawle*, 325.

(Williamson v. Mitchell.)

3d. The writ of *scire facias* does not contain an allegation or charge that the defendant ever entered into a recognizance, or that such a recognizance exists:—the plea of *nul tiel record* would be inapplicable to it, for it recites no record, there could therefore, be no recovery upon it. *Witherow v. The Commonwealth*, 10 Serg. & Rawle, 231.

*Moore and Foster* for defendants in error.

There is no necessity, in order to the validity of a recognizance taken by a justice of the peace, that it should be drawn out at length upon his record; a short memorandum from which it may be drawn out if necessary, is a substantial compliance with the act. But it was too late upon the trial of the cause, to take advantage of the defect, if one existed.

The rule on this subject is correctly laid down in *Means v. Trout*, 16 Serg. & Rawle, 349.

PER CURIAM.—It is impossible to support this judgment. A recognizance is an obligation of record, with condition to pay money, or do some particular act; and it is in most respects like any other bond, the chief difference consisting in this, that a bond is the creation of a fresh debt, and a recognizance the acknowledgment of a former one. Here the justice has certified that the bail was “bound in a *sum* sufficient to cover all costs.” What was that sum? It was impossible for the appellee to know what to demand. Even the act of assembly under which the proceedings were, requires the bail to be taken in a *sum*; and it is not sufficient for the justice to state the fact generally in the words of the act, without shewing in the recognizance what the sum was.

In an indictment it is not enough to pursue the very words of a statute which has created the offence, it being necessary to allege the special fact in which the offence consists. (2 Hawk. 354.) Here the fact by which only an obligation could be incurred, the acknowledgment of indebtedness in a sum certain—is not alleged. The recognizance is therefore void; and even if it were valid as a stipulation, still an action of *assumpsit*, and not of *scire facias*, would be the remedy. But the *scire facias* is even more defective than the recognizance. It neither recites the recognizance, nor alleges any fact to entitle the plaintiff to execution; but resembles a rule to shew cause more than any thing else. Its defects are not cured by the verdict, because it sets forth nothing, either in substance or in form, which resembles a cause of action, and being in the place of a declaration, it is incurably vicious. It mortifies one’s professional pride to find such a writ among our records, for which the alleged incompetency of the prothonotary is no apology, it being the business of the attorney to see to the form of the process. Such looseness is discreditable to the practice of our courts, and we are therefore, compelled to speak of it with marked disapprobation.

Judgment reversed.

HUSTON, J. and SMITH, J. dissented.



HARVEY *against* BOIES.

Words which impute an offence against morality, are not actionable, unless the offence be indictable or induce some legal disability.

Therefore to say "J. H. swore a lie before the sessions, and I can prove it by twenty witnesses," is not actionable.

This record was returned with a writ of error which issued to the Court of Common Pleas of Beaver county, where it was an action of slander brought by *John Harvey* the plaintiff in error, against *John Boies* the defendant in error, for speaking the following words—"John Harvey swore a lie before the sessions, and I can prove it by twenty people:"—which the court below (SHALER President) charged the jury were not actionable, and the plaintiff therefore could not recover—to which opinion the plaintiff excepted, and the same was assigned for error in this court.

*Fetterman* for the plaintiff in error.

Christianity is a part of the law, and ecclesiastical tribunals are essential to its propagation and existence, and hence the necessity of recognizing as judicial, those tribunals which have been erected among all denominations for the administration of those laws, which although peculiar to the respective subjects of them, are nevertheless binding and obligatory. To deprive them of their habitual mode of inquiring after truth, is to deprive them of the power of administering their laws, and punishing in their own way, offenders. The offence of false swearing, before the tribunal of an ecclesiastical body, is in point of morality as great as perjury before a temporal court; and every reason which prompts the punishment of the offender in one case, is equally applicable to the other.

In the course of his argument, Mr. *Fetterman* cited *2d Day's Connecticut Rep.* 3. (*Commonwealth v. Updegraff*.) *McMillin v. Birch*, 1 Bin. 186. 1 *Croke*, 135. 185. *Eckert v. Wilson*. 10 *Serg. & Rawle*, 47, *Guardians of the Poor v. Green*. 5 Bin. 555. *Hawk. Pleas of the Crown*, 430, book 1, chap. 3.

*H. M. Watts* for defendant in error.

Actionable words must contain in themselves an express imputation of an offence which would be indictable, and which might subject the party to infamous punishment. *Onslow v. Horn*, 3 *Wilson*, 186. *McCurry v. Ross*. 5 Bin. 218. *Shaeffer v. Kintzer*, 1 Bin. 552. *Brooker v. Coffin*, 5 *Johns. Rep.* 191.

The office of the inuendo is to elucidate, and not to enlarge the meaning or common import of the words spoken: Do the words as spoken and laid in the declaration, charge *Boies* with an offence for which if true he might be indicted, and if convicted, punished? Per-

(Harvey v. Boies.)

jury is false swearing when a *lawful oath* is administered by a *judicial tribunal* having power to administer an oath. The sessions of the church is not an ecclesiastical court; and if it was, it is not recognized by our constitution and laws as a *judicial tribunal*, or as competent to administer an oath: to say therefore of a man, that he swore falsely before the sessions of the church, does not import a charge of perjury, for which if true, the person charged might be indicted and convicted; and this is the true criterion by which words which are actionable, and those which are not, may be judged of. *Ward v. Clark*. 2 *Johns. Rep.* 10. *Skinner v. Trobe*, *Cro. Jas.* 190. *Page v. Krole*, *Cro. Jas.* 436. *Shaeffer v. Kintzer*. 1 *Bin.* 542.

The opinion of the court was delivered by

GIBSON, C. J.—If there is any rule established by universal assent, it is that words which impute an offence against morality, are not actionable unless the offence be indictable, or induce some legal disability. No one will pretend that perjury can be assigned in an extrajudicial oath; and to assert that every oath is judicial in the technical sense of the word, which it may be lawful and proper to administer, would ascribe to tribunals merely spiritual, the ordinary attributes of temporal authority: a connexion which no friend to the purity of religion would wish to see established. From time immemorial Christians of every denomination have doubtless had their ecclesiastical courts; and to these is allowed full and free power to adjudicate on matters submitted to them. But when the civil magistrate is called in to punish for a disregard of the sanctions which they impose, it becomes a question, whether he can interpose, without perverting his power from its legitimate objects. Christianity has been indefinitely said to be a part of the law of the land. The law undoubtedly avails itself of the obligations of Christianity as instruments to accomplish the purposes of justice. But judicial oaths are not founded exclusively on the belief of the Christian's revelation, a Jew or a Gentoo being allowed to swear in the form prescribed by his faith. Christianity is indeed recognized as the predominant religion of the country, and for that reason, are not only its institutions, but the feelings of its professors, guarded against insult from reviling or scoffing at its doctrines: so far it is the subject of special favour. But further the law does not protect it. Happily it neither needs nor endures the patronage of temporal authority, from contact with which, it is proved by all experience, to contract defilement. But perjury is punishable in the temporal courts, not for its moral guilt, but its consequences to the public at large, in obstructing the administration of distributive justice. Its consequences however, do not affect the public at large, where it has been committed in an ecclesiastical court, inasmuch as they consist in the obstruction of discipline among the members of the particular sect; and to punish it as an offence against the public, would be to treat it as what it clearly

(Harvey v. Boies.)

is not, and to enforce by the civil arm, the laws of a religious society; an object foreign to the aim of temporal government. If, then, false swearing in a spiritual matter, be not in reason, as it certainly is not in point of authority, an indictable perjury, what show of argument is there in favour of the position that words which impute it are actionable?

According to the principles of the action as now universally understood, it is not the infamy of the charge which constitutes the injury, but the danger created by it of sustaining a criminal prosecution or incurring a legal disability. This distinction is a guide which leads through every intricacy of circumstances, to at least, certainty of conclusion. It is of little account that the infamy is in fact the substantial injury. To have any law at all in the world, it is necessary that the consequences of human actions be determined beforehand by fixed principles, and not subsequently by the arbitrary discretion of the magistrate: and the law of slander as it is already established, is, if not as consistent with what may be thought natural justice, certainly more convenient in practice than the anomalous mass that would be produced by deciding every case on its circumstances, according to the dictates of reason or of passion. In any event we are not at liberty to declare the law otherwise than as we find it; and according to the authorities, with a single exception, the words laid and proved are not actionable.

Judgment affirmed.

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### PUMROY *against* LEWIS.

#### IN ERROR.

The prothonotary of the Court of Common Pleas, has no power to administer the oath required to obtain a writ of error.

ERROR to the Common Pleas of *Erie county*.

*Babbitt* moved to quash the writ of error in this case, because the affidavit was sworn to before the prothonotary of the Common Pleas, who, he insisted, has no power to administer an oath except in special cases, when he derives the power from positive enactment.

*Pearson* and *Barrett*, *contra*, argued that under the former constitution of the Common Pleas, the prothonotary, being one of the judges, had a general power to administer oaths, which he still retains by virtue of the twelfth section of the act of the 13th April, 1791, *Purd.* 401.

PER CURIAM.—Formerly this officer had a general power to administer judicial oaths by virtue of his office, not of prothonotary,

(Pumroy v. Lewis.)

but of judge; but when the two offices came to be separated, the powers incidental to them were also separated, *reddendo singula singulis*, except so far as the contrary was specially provided. But the judicial powers retained by prothonotaries under the provisions of the act of 1791 extend no further than to signing judgments, writs and process; and to taking bail. Had the general power to administer oaths been supposed to be retained of course, it would scarce have been thought necessary to give a power specially limited to the business of the office. But a prothonotary of the Common Pleas has nothing to do with expediting the writs of the Supreme Court; consequently the affidavit to ground a writ of error must be sworn to before the prothonotary of the Supreme Court, or some officer who has a general power to administer oaths.

Writ quashed.

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ROBERT T. KING *against* WILLIAM KING and STEPHEN MUNGER, Administrators of EARL KING.

A Justice of the Peace, being a judicial officer, must have his court or place of administering justice: and in order to the validity of an amicable judgment upon his docket, the party confessing the same must be before him and at his office.

The plaintiff in error, who was also the plaintiff below, sued out this writ of error to the Common Pleas of Erie county, to remove the record of a suit which originated upon a writ of *scire facias* to revive a judgment against *Earl King*, obtained and entered under the following circumstances.

An unsettled account existed between the plaintiff and defendant, and they, without any other authority than their own consent, called together three of their neighbours, to whom they agreed to refer their respective claims. After the parties had exhibited their accounts, on the one side and the other; in consequence of their conduct, one of the arbitrators proposed to separate, and alleged that the parties could settle amicably themselves. The parties then sat down and examined the accounts of each other, items on each side were agreed and objected to; it finally resulted in an agreement, that there should be a report of the arbitrators for \$500 in favour of *Robert T. King*, against his father *Earl King*, \$50 of which was to be paid in hand, and *Earl King* was to give a judgment upon the docket of *John McCord*, Esquire, a justice of the peace, who was also one of the three arbitrators present, for \$450 with stay of execution till the death of the defendant *Earl King*. This arrangement took place at the house of *Earl King*, where *John McCord*, Esquire,

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the justice made a note in writing of the amount agreed upon to be entered as a judgment upon his docket, and shewed it to the defendant, who was satisfied. The justice then returned home, and entered the judgment upon his docket, as agreed upon by the parties. A few days afterwards, *Earl King* called upon the justice to know if the judgment would carry interest, and upon being told that it would, he was dissatisfied with it.—A transcript of this judgment was entered upon the records of the Common Pleas of the county of Erie, was burnt with the court house, and its place supplied by a new transcript, entered by authority of the act of assembly for that purpose: and to revive which, and shew cause why execution should not issue, after the death of *Earl King*, this *scire facias* was issued to *February Term, 1827*. The defendant's pleas were *nul tiel record*—that the judgment was obtained by fraud—and payment, with leave to give the special matter in evidence.—The plaintiff replied *non solvit*—and no fraud.

By a suggestion of the court, the defendants withdrew the plea of *nul tiel record*; the "plaintiff's counsel agreeing to the admission of parol evidence on the plea of fraud."

Much evidence was given on one side and the other, as to the mental capacity of the defendant, *Earl King*, to attend to his own business, at the time he agreed to the amount of the report which the arbitrators should make: all which was submitted by the court to the jury as a matter of fact.

The court (SHIPPEN *President*.) in their charge to the jury on the subject of the alleged fraud, in obtaining the judgment, said, "that no evidence of, or security for a debt could be framed or taken, which would preclude an inquiry into the transaction if fraudulent; and that this rule applied to the cause now trying; for if the jury believe that the judgment was obtained by fraud, in consequence of the mental incapacity of the defendant, it is void. That a confession of judgment of this kind, before a justice of the peace, for so large a sum of money, is dangerous; for the only place and manner in which a judgment entered for a sum above a hundred dollars, before a justice and a transcript thereof filed, could be inquired into, would be on a *scire facias* to revive; when the question might be met—that there was no chance of relief for the defendant, unless the plaintiff is under the necessity of issuing a *scire facias*, and then the question might be met. That as the parties did not appear before the justice to enter the judgment, and as the justice merely took the admission of defendant, as to the amount of this judgment, at defendant's house, where he was called as an arbitrator, and entered it in his docket when he went home, in such a manner as to carry interest from the date, when it does not appear so intended by *Earl King*, it is not a good, binding judgment under the act of assembly."

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The jury returned the following verdict—"That they find for defendants, on the ground of the judgment being void and illegal, and not on the plea of fraud."

In this court the following errors were assigned:

1st. The plea of fraud was impertinent and illegal.

2d. The court erred in charging the jury, that the merits of the judgment could be investigated, and the judgment annulled, on the ground of fraud, in the *scire facias* suit.

3d. The court erred in charging the jury, that the judgment was not a good and binding one under the act of assembly.

4th. The jury having found that the judgment before the justice was not obtained by fraud, could not find by their verdict that it was illegal and void.

*Selden* for plaintiff in error.

The only question to be decided is, whether this judgment is illegal or not. By reference to the 14th section of the act of 1810, (*Purdon's Digest*,) it will be seen, that the proceedings in obtaining this judgment, have strictly conformed to the provisions of that act; and what it was that induced the court to instruct the jury that this was not a valid and binding judgment, is difficult to determine. The merits of the original judgment cannot be enquired into on a plea to a *scire facias*:—the cases in which judgments have been overhauled, is for something occurring since the entry of the judgment. I had thought that the adjudication of the case of *Benton v. Burgot*, 10 *Serg. & Rawle*, 240, was decisive. There the plaintiff replied to the first plea, that there is such a record, and demurred to the second, viz: that it was obtained by fraud, &c. The court overruled the demurrer, but this court on a writ of error said, that evidence of fraud, imposition, mistake, and want of consideration, is bad on demurrer. *Nul tiel record* is the only plea of which the defendant can avail himself. Also the case of *Cardesa v. Humes*, 5 *Serg. & Rawle*, 65, in which the court say "that under no circumstances can the merits of the original judgment be inquired into by the defendant, on a *scire facias*, so as to enable him to set up a defence which he might have used in the original suit." The court may open the judgment, but in no other way can their equitable power be interposed.

The objection raised by the court below, was that the judgment was not entered at the justice's office; he took a note of it; he showed it to *Earl King*; he was satisfied. The court further say, it was not entered according to the intent of the parties; we have the certificate of the justice that it was. It then was a mistake as to interest; that mistake will not invalidate the judgment.

*Sill* for defendant in error, was requested by the court to confine his remarks to the third error assigned.

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By the act of assembly under which this judgment is entered, a limited authority is given to justices of the peace, and it must be strictly pursued; and a judgment entered by authority of that act, and not in conformity with its provisions, is void. *Alberty v. Dawson*, 1 Bin. 106. *Brenneman v. Greenwall*, 1 Serg. & Rawle, 30. The act provides that the parties shall voluntarily appear before him for the purpose, when the judgment is to be entered for a sum exceeding one hundred dollars;—in this case the parties did not appear before him at a place where he had the means of doing those things which the act requires of him; and it would be unsafe and injudicious, to render valid the proceedings of a justice, which had been subjected to the uncertainty of a treacherous memory. So careful has the legislature been to guard against looseness and carelessness, in the administration of the law, that it has been provided that a justice shall not keep his *stated office* in a tavern. The facts exhibit the danger of such looseness, as has been practised in this case. The justice either forgot or mistook, the terms upon which the judgment was agreed to by *Earl King*; for it was not his intention that the judgment should carry interest during his life, or be satisfied by any thing but property when he was dead.

A misdirection of the court upon matters of fact, is not assignable for error. *Rouvert v. Patten*, 12 Serg. & Rawle, 253. *Long v. Ramsey*, 1 Serg. & Rawle, 72.

*Banks* on the same side, whom the court declined to hear.

*Derrickson*, in reply.

On the plaintiff's consenting to withdraw the plea of *mul tiel record*, and the plea of fraud being entered, it was not intended by either party, or contemplated by the court, that the regularity or validity of the judgment as entered by the justice, should be inquired into, but merely the consideration of that judgment; as it was alleged that the plaintiff had taken advantage of the defendant, then an aged man, and in his dotage: which fact, if it should be established to the satisfaction of the jury, it was agreed under the plea of fraud, should authorize them in finding for the defendants. But even if, from the pleadings, it should be considered that it was intended to submit the regularity of the judgment before the justice to the jury, for them to pass upon, their privileges and duties were infringed upon by the court, when they stated to the jury in positive terms, that the judgment was void and illegal; which must have been on an assumption of facts, of which the court was not competent to judge. If however, the court below was authorized from an inspection of the record, in saying that the judgment was void and illegal, then it was the province of this court to examine and ascertain, whether there was any thing to justify a decision of the kind. The principle of law is established and undeniable, that the court and the jury have each their respective duties, the one to decide questions of law, and the

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other those of fact: but here it was a difficult matter to say, whether this had been adhered to, for the court can only judge from inspection, and not from parol evidence, whether there is a record. And although there was no denial of the record, the court say there was none; and the jury after finding that there was *no fraud*, assume the prerogative of the court's power, and in its language, respond that the judgment was void and illegal; which, if the fact was so, there was no necessity of a finding by the jury at all.

By the act of 1810, under which this judgment was entered, justices of the peace are authorized to enter judgments for any amount, when confessed by the parties. Here it does not appear that the parties appeared before the justice at his office, to enter the judgment, but that which was all material to the rendering of one, viz: the agreement to the sum, the stay of execution, the consent of the defendant, and his directions to the justice, then, within his district, to enter the judgment; and the subsequent and actual entry by the justice, was fully complied with: and any evidence there was, that the judgment was not to be paid in money, but stock, and no interest to accrue in the mean time, and declarations of the defendant, subsequent to the entry of the judgment, could have no effect to defeat the rights of the plaintiff: and even if the facts had been so, it was making the justice a party to the fraudulent transaction;—as fraudulent it must have been in him, to enter a judgment contrary to the parties' agreement; and would have justified the jury in finding a verdict for the defendant under the plea of fraud.

The opinion of the court was delivered by

GIBSON, C. J.—The irregularity of inquiring into the validity of the original judgment in the trial of the *scire facias*, was waived by the plaintiff, who, in agreeing to the admission of parol evidence of the alleged fraud, consented to a trial on the merits; and as the jury have negatived the fraud, the only assignment of error that can be urged, is that which relates to the direction with respect to the objection depending upon legal grounds. Evidence having been given that the parties being at the house of a third person, and before arbitrators, of whom the justice was one, compromised their dispute, the defendant agreeing to confess judgment for a sum certain; and that the justice having, with the assent of the defendant, made a memorandum of the terms, entered it on his docket at his return home; the court instructed the jury that a judgment thus rendered, is illegal and invalid.

A court is defined to be a *place* where justice is judicially administered; and a justice of the peace, being a judicial officer, must necessarily have his court or place of administering justice. That the matter has been so regarded by the legislature, is clear from the act of assembly by which he is forbidden to keep his "stated



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office" in a tavern. It is difficult to conceive of the office of a judge, without at the same time, associating with it the idea of a place for the performance of its duties. The judgment was however actually rendered at the justice's office. But were the parties before him there? That is not pretended: but, it is said, the confession of the defendant was received when they were actually before him. That brings the argument back to the point from which it started, the receiving of the confession being as much a judicial act as the recording of it. But it is said the justice acted under a previous authority. It has been determined, however, that a warrant of attorney, which is quite as operative as a parol authority, is altogether insufficient. The act of assembly which gives him a qualified jurisdiction, *requires the parties to be before him*; and the abuses that might otherwise be practised, are sufficiently obvious to require him to be held to the letter of his authority. In the instance before us, the defendant disputed the correctness of the entry at the moment it was shown to him. Had he been present when it was made, there would have either been no cause or else no room for cavil.

The judgment below is therefore to be affirmed; but the effect of it is not so easily determined. The verdict has not disposed of the demand, but merely of the original judgment. By agreeing to put this matter in issue on the trial of the *scire facias*, the parties have created difficulties which perhaps they did not anticipate. If the proper judgment on the verdict be, that the original judgment be reversed or vacated, then the *scire facias* is in substance a writ of error on the part of the defendant, who in contemplation of law demands nothing by the writ; and in giving effect to the agreement of the parties, I am unable to see how we can escape from giving it this preposterous effect. I am not, even yet, certain that we ought not to reverse it for the irregularity, and leave the defendant to start a second time from the proper point, whence his course would be a plain one. A transcript entered on the docket of the common pleas, is, as regards real estate, virtually a judgment of that court, (*Branan v. Kelley*, 8 Serg. & Rawle, 479.) consequently it may be set aside on motion, with or without an issue, where it has been obtained surreptitiously; or it may be only opened to let the party into a defence when he has missed his time either by accident or mistake; a practice extremely beneficial and founded on the chancery powers which our courts are in the daily habit of exercising. The matters however which constitute the defendant's title to relief, must have existed previous to, or at the time of rendering the judgment. If they be subsequent, the court will not interfere in a summary way, further than to stay the execution, because they may be pleaded to a *scire facias*, which if it be necessary, the plaintiff will be ordered to bring. A neglect of this distinction, sometimes produces confusion and inconvenience, and at all times evinces slovenliness of practice. Here the matter complained of, existed at the time of entering the

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judgment, consequently the proper course was an application to have the judgment set aside; but as the defendant has succeeded by an irregular course, adopted it would seem by agreement, he is entitled only to the advantages that might have been obtained in a regular way. The original judgment will therefore not stand in the way of a fresh action.

Judgment affirmed.

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### DARRAH *against* WARNOCH.

#### IN ERROR.

In a case which originated before a justice of the peace, from whose judgment there was an appeal to the common pleas, where a verdict and judgment was rendered for a sum exceeding the jurisdiction of the justice, this court affirmed the judgment upon the plaintiff's releasing the excess.

THIS writ of error was issued to the court of common pleas of Beaver county, upon the return of which, the record showed the proceedings in a suit, which originated before a justice of the peace, wherein *James Warnoch* was plaintiff, and *Robert Darrah* was defendant. It was brought to recover the amount of a judgment, which the defendant *Darrah*, had had against one *Johnston*, and upon which he received the money from the defendant *Johnston*, after he had transferred it to the plaintiff in this suit, *James Warnoch*.

On the 28th July, 1827, the justice rendered judgment for the plaintiff for eighty-three dollars and sixty-two and a half cents debt, and sixteen dollars and thirty-seven and a half cents interest, making one hundred dollars: from which judgment the defendant appealed. A declaration was filed containing two counts, the first a special one, and the second for money had and received. Pleas *non assumpt infra sex annos*, and payment with leave, &c. Replication that he did assume within six years, and did not pay. Issues.

On the 15th January, 1828, a verdict and judgment were rendered for the plaintiff for one hundred and fourteen dollars and ninety-nine cents.

The error assigned in this court was that the cause of action was not within the jurisdiction of a justice of the peace, the recovery being for more than one hundred dollars, and interest thereon.

*Fetterman* for the plaintiff in error.—The law is well established that it is error to institute a suit before a justice, if the cause of action exceeds his jurisdiction. *Hinds v. Willis*, 13 Serg. & Rawle, 214. *Moore v. Wait*, 1 Bin. 219. *Owen v. Shelhamer*, 3 Bin. 45. *Laird v. McConachy*, 3 Serg. & Rawle, 290. The verdict and judg-

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ment in the common pleas, were rendered for one hundred and fourteen dollars and ninety-nine cents, within six months of the time when the judgment of the justice was entered: by which it is manifest that the cause of action when the suit was instituted, exceeded the jurisdiction of the justice.

*Forward and Moore* for defendant in error.

In the case of *McEntire v. McElduff*, 1 *Serg. & Rawle*, 19, this court decided, that if the judgment of a justice, be for a sum within his jurisdiction, and on an appeal to the common pleas, judgment be given for a sum above his jurisdiction, the judgment of that court shall not be arrested, unless it appear, that the cause of action was different. See also *McKinley v. McCalla*, 5 *Bin.* 600.

The jury had it in their power, and might have given something to the plaintiff, as damages to compensate him for vexation, and to cover the expenses of the appeal.

*Fetterman* in reply.—In the case of *Kingston v. Lee*, (not reported) this court reversed the judgment, because the damages laid in the declaration exceeded the jurisdiction of the justice, before whom the suit originated.

This was an action of assumpsit, and there could have been no damages allowed beyond the interest of the claim.

PER CURIAM.—The case is with the plaintiff, both on principle and authority. As regards the cause of action, the proceedings on appeal are not *de novo*; and the plaintiff can recover no more than he might have recovered before the justice. A judgment for more would be decisive either that the action was improperly commenced or improperly prosecuted. A plaintiff may undoubtedly remit a part of his demand, to bring the residue within the jurisdiction of a justice; but, having done so, he must proceed consistently, and cannot set up on the appeal the part that he had previously abandoned. So that when the judgment on the appeal is for a greater sum than could have been recovered before the justice, it involves the plaintiff in the dilemma either of having sued for too much originally, or of having recovered what he had previously released. But as he might have released the excess below, and as there is an increasing liberality in courts of error, we think it reasonable to afford him an opportunity to do so here.

The plaintiff instantly released the excess at the bar, and the judgment was affirmed.

JOHNSTON *against* PERKINS.

## IN ERROR.

A. brings an action of assumpsit before a justice of the peace against B. and recovers a judgment for a certain sum, from which B. appeals: the cause being afterwards tried in the common pleas, a verdict and judgment was rendered in favour of A. for the same sum. Held that A. was entitled to recover his costs since the appeal.

THIS record was returned upon a writ of error to Crawford county.

*James W. Perkins* brought a suit before a justice of the peace against *James Johnson*, and recovered a judgment on the 27th March, 1824, for fifteen dollars; from which *Johnson* appealed. The cause was afterwards tried in the common pleas, and on the 15th November, 1825, a verdict was rendered for the plaintiff for fifteen dollars. A motion was then made that judgment should be entered without costs; which the court on argument dismissed, and entered judgment generally for costs.—This was assigned for error in this court.

*Selden* for plaintiff in error.

The defendant obtained a more favourable judgment than that of the justice, because if the interest to which the plaintiff would be entitled was added, the sum would be greater than fifteen dollars.

*Derrickson* for defendant in error, was stopped by the court.

PER CURIAM.—We cannot say that any part of the judgment was made up of interest since the appeal, or that the appellant succeeded to the amount of a farthing. The interest being a small matter, the plaintiff may have abandoned it: and although a contrary presumption might be made to support a judgment, it cannot to reverse one. The judgment for costs is not only possibly, but probably right; and we are not to reverse on suspicion of error.

Judgment affirmed.

## ELLIOTT for the use of STANARD against CALLAN.

If one who is about to receive the assignment of a single bill, calls upon the payor to know whether he will pay the money, and is informed by him that he will; he cannot afterwards set up any defence against the payment of the money to the assignee, which existed previous to such declaration.

WRIT of error to the court of common pleas of Indiana county: the plaintiff in error was the plaintiff below. On the 8th July, 1822, the defendant *James Callan*, appeared in person and confessed judgment to the plaintiff *James Elliott*, for the use of *Daniel Stanard*, for the sum of three hundred and thirty-six dollars and thirty-seven cents.—On the 26th September, 1826, the defendant obtained a rule to shew cause why the judgment should not be opened and he let into a defence: which on the 17th March, 1827, was made absolute. Upon the trial of the cause, the plaintiff gave in evidence the single bill upon which the suit was founded, for three hundred dollars, dated 6th March, 1820, payable 1st July, 1822, with interest from the 1st July, 1821, together with the transfer thereof to *Daniel Stanard*. It was admitted, that the consideration of the said single bill was a conveyance of two out lots in the borough of Indiana, Nos. 1 and 2, by *James Elliott* and wife, to *James Callan*.

The defendant then gave in evidence a deed from *James Elliott* and wife to *James Callan*, dated 6th March, 1820, for out lots Nos. 1 and 2: and also the exemplification of a mortgage from *James Elliott* and wife to *Joseph Brownson*, executor of *William Smith*, deceased, dated 22d November, 1819, and recorded the 15th May, 1820, within six months from its date. It also appeared that this mortgage was given to secure the payment of a bond which bore even date therewith, conditioned for the payment of two hundred and forty two dollars and fifty-one cents, to the said *Joseph Brownson*, by the said *James Elliott* and *Joshua Marlin*, who was his security.

On the 19th February, 1822, *James Callan* and wife conveyed the said two lots to *Joshua Marlin*; and *Joshua Marlin* and wife, by deed dated the 29th of January, 1823, conveyed the same to *Thomas Sharp*.

*William Banks*, Esquire, was then called as a witness, and testified that the bond of *James Elliott* and *Joshua Marlin* had been sent to him for collection; that it was the same money for which the mortgage had been given; that *Elliott* was insolvent, and he applied to *Marlin* for payment, who at first refused, because *Brownson* had not entered up the mortgage, as he alleged he should have done; but afterwards he paid the money, and Mr. *Banks*, by virtue of a power of attorney, entered satisfaction on the margin of the record of the mortgage, on the 10th of August, 1827.

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The plaintiff then called *James Elliott*, as a witness, who said, "*Daniel Stanard* was an attorney of this court, and had several claims against me for collection, to the amount of three or four hundred dollars. I told him I had a single bill on *James Callan*, I would give him in payment if he would take it: he said he would agree to take it, provided *Callan* was agreed to it. I then went to Mr. *Callan*, and asked him if he had any objections to my transferring his single bill to Mr. *Stanard*, and told him that perhaps Mr. *Stanard* would give him more time than I could, as I was pressed. Mr. *Callan* then came with me to Mr. *Stanard*, and in his presence, he agreed that I should assign the single bill to Mr. *Stanard*, and said he had no objections, and that he would pay it: my impression was that Mr. *Stanard* gave me receipts on the docket. I know he released me from the payments of money—he never called on me since:—One case was *Nourse* of Baltimore, and *McKinstry* was another case; I do not think I ever told Mr. *Stanard* of the mortgage—Mr. *Stanard* agreed to take the single bill as a payment of the claims which he had against me, and settled with me for the whole amount thereof. I paid him the balance in money about a year afterwards—Mr. *Marlin* was only my bail in the bond. I do not recollect that I told *Callan* of the mortgage at the time I sold to him. The single bill was assigned in *Callan's* presence to Mr. *Stanard*."

The plaintiff's counsel requested the court to instruct the jury, that if they believe that *James Callan*, at and immediately before the assignment, knew that *Daniel Stanard* was about to purchase and take an assignment of said single bill, and did then and there inform said *Daniel Stanard*, that he was willing he should purchase and take such assignment, and that he would pay the same, or had no objection to make against the payment of the same—and that in consequence of said declaration, said *Daniel Stanard* did then and there purchase and take an assignment of said single bill, *bona fide*, and for a valuable consideration; said *James Callan* cannot in this action set up as a defence, the fact of an existing mortgage, given by said *James Elliott* on the premises, which was the consideration of the said single bill.

2d. If the jury believe that *Joshua Marlin* on the 29th July, 1823, sold the mortgaged premises to *Thomas Sharp*, and afterwards on the 14th June, 1827, paid the amount of the money due thereon to the mortgagee, who by an attorney in fact entered satisfaction upon the margin of the record of the said mortgage, on the 10th August, 1827—the defendant cannot set up said mortgage as a defence in this suit to the payment of his single bill.

Whereupon the court, (Young President,) charged the jury as follows:

The defence to the recovery of the bond in question, is what is usually termed an equitable one, founded on an alleged failure of the consideration to the extent of two hundred and forty-two dol

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lars and fifty-one cents, with interest thereon from the 1st of March, 1823. It appears that *James Elliott* executed a bond, with *Joshua Marlin* as his surety, and a mortgage dated 22d November, 1819, to *Joseph Brounson*, on two out lots, for securing the payment of that debt; he afterwards sold and conveyed those out lots to the defendant, with covenant of general warranty by deed dated 6th March, 1820. The mortgage was not then recorded, but was within six months from its date, and became a lien on the property from that date—it was an incumbrance which *Elliott* was bound to remove; and having failed in this, it is admitted by the counsel for the real plaintiff, *Mr. Stanard*, that the defence would have been good as against *Elliott*, but he contends it is not available against his assignee, who it is alleged purchased the bond *bona fide*, for an adequate consideration, and with the knowledge and consent of the defendant himself. So far as it respects the last matter, it depends entirely on the testimony of *Elliott*, whose bias appears pretty strong in favour of the assignee, and whose confidence in him seems also to have been unlimited; he made the assignment in satisfaction, as he stated, of various claims on him, for moneys he had collected as sheriff, for *Mr. Stanard's* clients, without taking a receipt for any one of them: his first impression was that *Mr. Stanard* entered receipts on the docket; towards the conclusion of his testimony he stated, that *Mr. Stanard* generally receipted on the docket, as he, the witness, understood. There is no evidence of any receipt, and not even of the memorandum which was taken of the claims, at the time of this transaction: taking the whole of it into view, with his concealment of the mortgage, on that occasion, and so far as it appears on every other, the credit of the witness, to say the least of it, is not superior to exceptions. That subject, however, is for your consideration, rather than that of the court. If you are not satisfied with the relation he has given: if, in fact, you believe no valuable consideration passed from *Stanard* to *Elliott* at the time of the assignment, the weight of the reasoning founded on it falls to the ground. But admitting a valuable consideration did pass, unless you are further satisfied, that when (as it appears from *Elliott's* testimony) the defendant agreed to the assignment, which was executed in his presence; this ought not to be considered as an undertaking to pay the bond at all events, if he was then ignorant of the mortgage. But it is said that *Callan* said he would pay it; *Elliott* being called again stated that *Callan* did so say.—Were you to believe this, you ought to take into consideration the circumstances under which the declaration was made. There is certainly no testimony of his having been then cognizant of the mortgage; nor until some short time before the motion at September term, 1826, for opening the judgment, which the defendant had confessed.

*Mr. Banks* stated it was about a year before he received the money, which was on the 27th June, 1827; that the bond was

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transmitted to him from *Brounson* in Baltimore: the existence of the mortgage was then but little known to any one; and the first notice of it seems to have been communicated by Mr. *Marlin*, who was alarmed for fear the mortgage had not been put on record; this led Mr. *Banks* to search, and having found it recorded, Mr. *Sharp* who had purchased from *Marlin*, became also uneasy: his willingness to the making of the assignments, (or as it is otherwise called in the paper on which the court is requested to instruct the jury,) his making no objection to the payment of the same, or even saying he would pay it, if ignorant of the mortgage, ought not under such circumstances to avoid the defence now set up. As to the remaining point:—I am of opinion, that *Joshua Marlin*, having sold the mortgaged property to *Thomas Sharp* with general warranty, was justified in paying off the incumbrance, to release himself from an action at the suit of *Sharp*. An action on the mortgage (which was in contemplation,) would have been the consequence, unless the money had been paid, as has been testified by Mr. *Banks*. These legal proceedings would have been attended with costs and expenses, which it was the interest of all parties to avoid, and particularly that of Mr. *Marlin*. It seems there is a balance due on the bond in question, after deducting the principal and interest on the mortgage; that balance the plaintiff is entitled to recover. Having given our sentiments upon the evidence, and our opinion on the questions of law proposed, the whole is now left to your consideration.

In this court the following errors were assigned to the charge of the court below, to the jury:

1st. In charging the jury that “admitting a valuable consideration did pass from *Stanard* to *Elliott* for the assignment of the single bill, and the defendant agreed to the assignment, which was executed in his presence; yet this ought not to be considered as an undertaking to pay at all events, if he was then ignorant of the mortgage.”

2d. In charging the jury, “that the willingness of the defendant, to the making of the assignment, or his making no objection to the payment of the single bill, if ignorant of the mortgage, ought not, under such circumstances, to avoid the defence then set up.”

*Foster and Baldwin* for plaintiff in error.—If an obligor assents to the assignment of his bond, without giving notice that he has a defence against it, he is concluded, and must pay it to the assignee, under all circumstances. *Carnes v. Field, et als.* 2 *Yeates' Rep.* 541. *Ludwich v. Crall*, 2 *Yeates' Rep.* 565. *Davis v. Barr*, 9 *Serg. & Rawle*, 187. *Weaver v. McCorkle*, 14 *Serg. & Rawle*, 304. If an assignee be induced to purchase a bond, in consequence of representations made by the obligor that he has no defence, or is willing to pay, the obligor cannot set up against the assignee any equity, of which he might have availed himself against the obligee, even though such communications were not made directly to the assignee, but



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merely communicated to another in his hearing. *McMullin* for use, v. *Winner*, 16 *Serg. Rawle*, 18. 1 *Wash. Rep.* 299.

The confession of a judgment by *Callan* was a new promise to the assignee.

*White* and *Alexander* for defendant in error.—It is admitted, that between *Callan* and *Elliott* the defence to the payment of the bond would be a valid and substantial one; and this assignment amounts to nothing more than a transfer of the single bill, by *Elliott*, who was a sheriff of the county, to Mr. *Stanard*, an attorney of the same court, for the security of his clients, who were creditors of the sheriff: it is not therefore a case of a *bona fide* purchase with the assent of the obligor; and therefore the authorities cited for the plaintiff in error are not applicable. The whole aspect of this case shows that no valuable consideration passed from *Stanard* to *Elliott*, but that the single bill was transferred as a collateral security.

In the case of *Burke v. Allen*, 3 *Yeates' Rep.* 356, it is determined that although a new promise be made to the assignee, yet "*ignorantia juris excusat.*"

The opinion of the court was delivered by

SMITH, J.—In the court below this was an action of debt, on a single bill, given by *James Callan* to *James Elliott*, dated the 6th of March, 1820, payable the 1st of July, 1822, and equitably assigned to *Daniel Stanard*, the 15th of June, 1822. On the 8th July, 1822, the defendant in person confessed a judgment to the plaintiff for three hundred and thirty-six dollars and thirty-seven cents. On the 26th September, 1826, a rule to shew cause, why the judgment should not be opened, was obtained, which on the 17th of March, 1827, was made absolute, the judgment to remain a lien in the mean time. The cause was tried on the 24th of December, 1828, when a verdict and judgment were rendered for the defendant.

On the trial it was admitted that the single bill has been given in part of the consideration of two out lots in the town of Indiana, sold by *Elliott* to *Callan*, and the record of a mortgage, dated the 22d of November, 1819, duly recorded, from *Elliott* to *Joseph Brounson*, executor of *William Smith*, deceased, on the same lots, was given in evidence by the defendant, who contended, that he was not liable to pay the bill, as the consideration of it had failed.

The plaintiff then proved by *James Elliott*, "that he went to *Callan*, and asked him if he had any objection to a transfer of his bill to *Daniel Stanard*: that on this *Callan* went with him to *Stanard*, and in the presence of *Stanard* agreed that he should assign the bill to *Stanard*, and said he had no objections, and would pay it."

Before the cause was submitted to the jury, the plaintiff's counsel presented certain propositions to the court, and requested them

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to instruct the jury, "That if they believed, that *James Callan*, at and immediately before the assignment, knew that *Daniel Stanard* was about to purchase and take an assignment of said single bill, and did then and there inform said *Daniel Stanard*, that he was willing he should purchase and take such assignment, and that he would pay the same, or had no objections to make against the payment of the same—and that therefore in consequence of said declaration, said *Daniel Stanard* did then and there purchase and take an assignment of said single bill, *bona fide*, and for a valuable consideration, said *James Callan* cannot in this action set up as a defence the fact of an existing mortgage given by *James Elliott*, on the premises, for part payment of the purchase money of the premises, for which said single bill had been given." The court thereupon instructed the jury, "That admitting a valuable consideration did pass, unless they were further satisfied, that when (as it appears from *Elliott's* testimony,) the defendant agreed to the assignment, which was executed in his presence, this ought not to be considered as an undertaking to pay *the bond* at all events, if he were then ignorant of the mortgage."

And the court further instructed the jury, that "his willingness to the making of the assignment, (or as it is otherwise called in the paper on which the court is requested to instruct the jury,) his making no objections to the payment of the same, or even saying he would pay it, if ignorant of the mortgage, ought not under such circumstances to avoid the defence now set up." To this charge the plaintiff excepted, and has assigned two errors arising on the same.

If any principle of law can be considered as settled, or ever can remain settled, it is this—that the assignee of a bond or single bill, takes it subject to all objections, which the obligor could legally make. He comes in the place of the obligee, and cannot stand in a different or better situation. So early as 1776, in the case of *Whaler* assignee of *Baynton, v. Huzes'* executors, we find in our earliest reports, 1 *Dall.* 23, this principle laid down by an able judge and great lawyer. And in our latest books of reports, 14 *Serg. and Rawle*, 306, the same principle is again recognized; and in a still later case, *Rudy and wife v. Wenner*, reported in 16 *Serg. & Rawle*, 18, it was declared that the assignee of a bond, whether the assignment be legal or equitable, takes it at his own peril, subject to every defalcation which might have been made against the obligee by the obligor, at the time of the assignment. But there is an exception. If the assignee previous to the assignment, applies to the obligor, informs him he is about to take an assignment of the bond, and inquires of him, if the money the bond calls for was due, and the obligor declares it is, he is estopped from denying it afterwards; for the obligor by such or similar declarations, promotes and encourages the assignment, and thereby precludes himself from

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the benefit of the right he would have had against the bond originally. His admissions operate virtually as a new contract between himself and the assignee. This exception is as well established, as the rule itself, in the cases above referred to, and in many more. The case cited by the plaintiff's counsel, (Mr. Baldwin,) from *Wash. Rep.* 296, *Buchner and others v. Smith and others*, is strong, perhaps stronger than the one under consideration, and in my opinion is decisive of it. There a bond had been given for a gambling debt, I believe for twenty-five thousand pounds of tobacco. This bond was afterwards assigned, and an action brought upon the bond, and judgment confessed by the defendant after he came of age. The assignee proved that he was induced to accept of an assignment of the bond by the obligor, who assured him that the bond should be punctually paid. And the court there said, "the principal objection is, that this is a gaming debt, contracted by an infant, which no subsequent act of his, nor any transfer, could make valid.

It is in general true, that an assignee of a bond of this sort, can be in no better situation than the obligee, and the cases cited at the bar sufficiently establish the point. But the present case is very different upon principle from those cases, and that difference is produced by the obligor's conduct, who by his assurances of payment, induced the assignee to receive an assignment of it. He not only concealed from him legal objections to the bond, but afterwards assumed to pay it, and when sued, voluntarily confessed a judgment." This case was, in a great measure, afterwards recognized by the court in *Elliott's executors v. Smack*, 390 of the same book.

On these principles, we think the court below erred, when they instructed the jury, that admitting a valuable consideration did pass from *Stanard* to *Elliott*, for the assignment of the single bill, unless the jury were also satisfied, that when the defendant agreed to the assignment, which was executed in his presence, it ought not to be considered as an undertaking to pay at all events, if he were then ignorant of the mortgage. And they moreover erred in informing the jury that the willingness of the defendants, to the making of the assignment, his making no objections to the payment of the same, or even saying he would pay it, if ignorant of the mortgage, ought not, under such circumstances, to avoid the defence set up.

*Stanard*, the equitable assignee, on the 15th of June, 1822, before he took an assignment of the single bill, and before it was due, asked the obligor if he was satisfied, he should purchase and take an assignment of the same, and whether he had any objection to make against its payment: he replied, he was satisfied such assignment should be made, and had no objection to the payment thereof, and moreover said he was desirous *Stanard* should purchase and take an assignment. I would ask, what could *Stanard* do more? All precedent measures were pursued before the transfer was accepted by

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him; the party who sealed and delivered the instrument was called on, a full and complete opportunity given to object, if he had any objections; but instead of objecting, answers that he is satisfied, and expresses a wish, that *Stanard* should take the assignment. It is therefore evident that the assignee was induced by the obligor to take the single bill, and part with his money for it. When *Stanard* applied to the debtor, he had a right to suppose, that he was cognizant of every thing which had given birth to the obligation, and that if a defence to it existed, he could and would inform him of it; for this purpose he made the application to him; he is not forbidden by the objector to purchase, but on the contrary is encouraged to do so. Under such circumstances, the obligor's conduct, whether it proceeded from ignorance or design, must be considered as an undertaking to pay. If there be a hardship in the matter, (for instance the existence of a previous mortgage unknown to the obligor, as is alleged) the obligor would be bound, for by his solemn assurances of payment, he induced the assignment; by his concealment of all objections to the bill, he, in fact, promised anew to pay it, and when sued, voluntarily confessed a judgment. We therefore think the plaintiff in error has sustained his exceptions, and that the judgment of the court of common pleas should be reversed, and a *venire facias de novo* awarded.

HURON, J.—Agreed to the general principle, but thought the facts of this case did not probably come within it. Here it was *Elliott* who went to the defendant to procure him to make the promise to *Stanard*. Here *Elliott* received nothing from *Stanard*; he was indebted to some of *Stanard's* clients, and assigned this bond in full for their use, though it was not stated so to be. If the jury should find the facts to be so, it is still *Elliott's* bond, and the money when collected, goes to his use and to pay his debts; and in that case the principle would apply, and the defence was not a good one.

Judgment reversed, and a *venire facias de novo* awarded.

**JOHN CHÉSS *against* FINLY CHÉSS, WILLIAM CHÉSS,  
WESLY CHÉSS, ANDREW CHÉSS, NELLY CHÉSS and  
MARY CHÉSS.**

Declarations of a grantor made subsequently to the execution of a deed, can not be given in evidence to invalidate that deed.

But when the question to be determined by the jury, is whether the grantor was sane or insane, at and about the time the deed was executed, it is competent to give in evidence his declarations made soon after the execution of the deed, for the purpose of proving imbecility of mind.

A man's *neighbourhood* is co-extensive with his intercourse among his fellow citizens. One witness, therefore, testified that he knew the general character of another witness, whose character was in issue, but he did not know his character in his *immediate* neighbourhood. It is competent to ask the witness whether he would believe him on his oath.

A deed procured by actual fraud, is void, and cannot be confirmed by subsequent acts or declarations of the grantor.

A delivery is essential to the proper and legal execution of a deed, and that delivery may be to the party, to one authorized by the party to receive it, or to a stranger for the use of the party; but the placing a deed on record by the grantor, is not an absolute delivery, but only evidence of it, of which the jury may judge.

The court sustained the challenge of a juror, on the ground that he was subpoenaed as a witness to impeach the credit of another important witness, who was to give evidence in the cause in which he was called as a juror: which was held to be no error.

THIS was an action of ejectment brought to recover a tract of land in Allegheny county, and was tried at a circuit court held for that county by justice ROGERS.

Both plaintiff and defendants were children of *William Chess*, deceased, and both claimed the land under their father; the plaintiff, by a deed dated the 14th February, 1823, and the defendants as heirs at law.

It was contended by the defendants, that the deed to the plaintiff from *William Chess*, his father, was void, in consequence of the mental incapacity of the grantor to make a deed on the 14th February, 1823, and that it was obtained by fraud. It was answered by the plaintiff that the grantor was of sound mind when he made the deed, that it was not obtained by fraud, and that subsequently to its date, it was confirmed by acts of the grantor.

*William Kerr* was called as a juror, and objected to by the defendants, on the ground that he was a witness in the cause, subpoenaed by the plaintiff, to give evidence on his behalf; and who had given evidence on a former trial as to a material matter. The court sustained the objection; and the juror when sworn as a witness, testified to the character of *John Ross*, another witness, whose veracity was impeached. During the progress of the cause, the defendants offered to give in evidence the declarations of *William Chess*, respecting the deed of the 14th February, 1823, to his son

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the plaintiff, made after its execution, which were objected to by the plaintiff, but admitted by the court.

The following is the substance of the evidence given on this subject:

*William Kerns.*—In the spring of 1823, a short time before his death, old *William Chess* came to my house; he sat down and looked as active as I ever saw him before. We walked out together, and he asked me if I heard what his son John had done to him; I told him no: he then told me, that he had got a fall from his horse, and John was taking him to town to the doctors, and took him to sign a deed: he said that owing to the fall from his beast, he was not in his right mind when he signed the deed. He also stated, that John was to give him some property in town in exchange, but had not done so. He said that if John would not give him up the deed, he would compel him to do it. By giving the deed to John he wronged the rest of his family.—I have known *William Chess* long and intimately, and had never considered him of unsound mind.

*John Ross.*—In April or May, after my return from over the mountains, old *William Chess* called on me, and told me he had come to see the lease I had written. I got it and read it for him. I then asked him the reason he brought his family into so many difficulties, stating that on the 13th February he had given a lease for three years to his boys, and next day had given a deed for part of the same property to another son, who had brought suit to dispossess those he had leased to. The old man said he had been deceived by John. He requested a copy of the lease to shew to John, and said that then John would give up the deed. On the 7th May he called on me, and told me that John would not give up the deed; and requested me to go with him to John, and get him to do so.

The plaintiff then called a great number of witnesses, who testified that the general character of *John Ross* in his own neighbourhood, for truth, was bad.

The defendants then called witnesses in support of the character of *John Ross*; who testified, in substance, that they did not know his character in his own neighbourhood; that they lived two, three, and four miles from him, and had little intercourse there with the neighbours of *Ross*; that they had heard his character spoken of where they lived and elsewhere, and that some spoke well, and some ill of him.

The witnesses were then asked by the defendant's counsel whether they would believe him on his oath, from what they knew of his general character.

This question was objected to by the plaintiff's counsel, but the court permitted it to be put, and the witnesses answered, "as far as I know him, I would believe him."

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Other witnesses testified "that they had known *Ross* a number of years—lived within three or four miles of him; that they did not know his character for truth in his own neighbourhood; that they had never heard it spoken of, one way or the other." To whom the court permitted the same question to be put and answered, upon objection being made by the plaintiff.

Other points arose, which will sufficiently appear in the reasons assigned for a new trial, and the opinion of the court.

A verdict was rendered for the defendants, when the plaintiff moved the court for a new trial, for the following reasons:

1st. That there was error in admitting evidence of the declarations of *William Chess*, the grantor, after the execution of the deed in question.

2d. In admitting the evidence of *Samuel Thompson, Benjamin Darlington, T. B. Dallas, George Evans*, and others, in relation to the credibility of *John Ross*, whose general character had been impeached by the plaintiff, and of whose general character these witnesses had no knowledge.

3d. In the court charging the jury, that if the deed of the 14th February, 1823, was invalid at that time, it could not be made valid by any subsequent act.

4th. In the court taking from the jury the consideration of the question, whether the deed of the 14th February, 1823, was confirmed or made good by any subsequent act of confirmation, or by a new delivery at any time afterwards.

5th. In charging the jury, that recording the deed was no delivery, but only evidence of it, of which the jury were to judge.

6th. In sustaining the challenge, by defendant's counsel, of *William Kerr*, a juror, on the sole ground that he was a witness in the case.

Which were overruled by the judge, and judgment was entered on the verdict, from which the plaintiff appealed.

In this court the cause was argued by *Burke* and *Baldwin* for appellant.

1st. The declarations of a grantor, after the execution of a deed, cannot be given in evidence to invalidate that deed. And if there be any reason for admitting evidence of the declarations of a testator in relation to a will made by him, that reason does not apply to the case of a deed: for wills are always revocable by the persons who make them, but deeds are not. A will is only consummated by the death of the testator, but a deed is consummated by delivery.

2d. A witness must first state, that he is acquainted with the general reputation for truth, of the person whose veracity is questioned, before he can be asked, or permitted to answer, the question, whether he would believe him on his oath. The law is well laid down on this subject in *Kimmel v. Kimmel*, 3 Serg. &

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*Rawle*, 336. *Wike v. Lightner*, 11 *Serg. & Rawle*, 198-9. *Brindle et. als. v. McIvaine*, 10 *Serg. & Rawle*, 485. *Norris's Peake*, 197. *Swift's Ex.* 148. 1 *Stark. Ex.* 148. 1 *McNally*, 304. *Bull Nisi Pri.* 296. *Phil. Ex.* 229. 3 *Danes Dig.* 346. 2 *Gilb. Ex.* 296.

3d and 4th. If *William Chess* had been incompetent to make a deed on the 14th of February, 1823, in consequence of weakness of intellect, and the deed was therefore invalid, yet by subsequent declarations and acts he might confirm it and make it valid; this he did do by exhibiting and reading it, and declaring to several persons that he had conveyed the land in dispute to his son. It was therefore manifest error in the court to decide that the deed could not be made valid by confirmation, and withdrawing the consideration of this part of the case from the jury. Cited *Shales v. Sir John Barrington*, 2 *Pr. Wills*, 270. *Murry v. Riggs et als.* 15 *Johns. Rep.* 573-586. *Verplank v. Sterry*, 2 *Eq. Ca. Ab.* 183. *Verplank v. Sterry*, 12 *Johns. Rep.* 552. *Bennet v. Vade et als.* 2 *Atk. Rep.* 324. *Shaler v. Barrington*, 1 *Pr. Wms.* 482. *Simms v. Slacum*, 3 *Cranch. Rep.* 300. *Fletcher v. Peck*, 6 *Cranch. Rep.* 133. *Jackson ex dem. v. Eaton*, 20 *Johns. Rep.* 482. *Broom v. Phelps*, 2 *Johns. Rep.* 178. *The Juniata Bank v. Brown*, 5 *Serg. & Rawle*, 231-234. *Duncan v. McCullough*, 4 *Serg. & Rawle*, 485. *Wiseman v. Beake*, 2 *Vernon*, 121. *Baugh v. Price*, 1 *Wilson*, 320. *Smith v. French*, 2 *Atkins* 244. *Powel on Con.* 163-193. *Newlin on Con.* 497-500. *Coke Litt.* 295-6. *Parker v. Parmele*, 20 *Johns.* 134. *Yard v. Adlum*, 1 *Rawle Rep.* 171-177.

5th. The deed remained in the hands of the grantor after its execution, and on the 16th April, 1823, it was put upon record by him, which was, of itself, a delivery and confirmation; for it is not necessary to the validity of a delivery, that it should be made to the grantee; it may be made to a third person, and not in the presence of the grantee. *Verplank v. Sterry*, 12 *Johns. Rep.* 547-551. *Jackson ex dem v. Phipps*, 12 *Johns. Rep.* 421. 13 *Viner's Ab.* 21. *Souwerbye v. Arden*, 1 *Johns. Chan.* 255. *Taylor et al v. Glaser*, 2 *Serg. & Rawle*, 502. The recording of a deed by the grantor, under our recording act, is equivalent to a livery of seisin. *Purd. Dig.* 165. A delivery is essential to, and is the consummation of a specialty. *Taylor et al v. Glaser*, 2 *Serg. & Rawle*, 503-4. *Goodright v. Shaphen*. *Comper's Rep.* 203. *Shepherd's Tou.* 60. *Perkins*, 154. *Inhabitants of Worcester v. Eaton*, 13 *Mass. Rep.* 374-5. *Jenkin's Rep.* 166. *Coke Litt. b.* 48. *Butler and Baker's case*, 3 *Coke's Rep.* 36. *Jennings v. Bragg*, *Croke Eliz.* 447.

6th. It is not a good cause of challenge, that the juror called, had given evidence on a former trial, or that he had been subpoenaed to give evidence on the trial to which he was called as a juror. Every juror in the box probably knew *John Ross*, and all might have been excluded on the same ground. On this point were



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cited, *Harper et al v. Kean*, 11 *Serg. & Rawle*, 380. *Parker v. Thornton*, 2 *Lord Ray*. 1410. 21 *Vin. Ab.* 268-272. *Durell v. Mosher*, 8 *Johns. Rep.* 347.

*Wilkins and Forward* for appellees.

1st. The declarations of *William Chess*, made after the execution of the deed, were competent evidence for the purpose for which they were given. We had shewn satisfactorily, as we believed, that he was incapable of making a deed on the 14th February, 1823; the plaintiff contended and endeavoured to shew, that even if the deed was invalid at the time it was executed, it became valid by the subsequent declarations and acts of confirmation by the grantor. It therefore became important for us to shew, by his conduct and declarations, after its execution, that he remained incapable of making a deed; and there is no better criterion by which to judge of a man's intellect, than his conduct and declarations. The rule of law is well settled, that it is competent to give in evidence the declarations of a testator, both before and after the execution of his will, in order to shew imbecility of mind, or incompetency to make a will; and there is no difference in the cases of a will and deed, when the testimony is offered for the same purpose.

2. All the witnesses examined as to the general character of *John Ross*, had previously known him for many years; they lived but four miles from him, and were perfectly competent to testify from their knowledge, whether they would believe him on his oath. *Kimmel v. Kimmel*. 3 *Serg. & Rawle*, 336. *Wike v. Lightner*, 11 *Serg. & Rawle*, 198-9. *Brindle et al v. McIlvaine*, 10 *Serg. & Rawle*, 285.

3d. and 4th. That which is absolutely void can never be made valid. If the facts were merely, that *William Chess* was incapable of making a deed on the 14th February, 1823, in consequence of imbecility of mind, a deed executed by him at that time, although ineffectual for any purpose, yet it might afterwards be confirmed. But that was not this case. Here it was alleged, and proved, that *John Chess* had obtained the deed from his imbecile father by fraud and imposition; it was, therefore, absolutely void, and no confirmation can rest upon the basis of fraud; there must be a new consideration. *Murry v. Riggs*, 15 *Johns. Rep.* 573. *Duncan v. Findley*, 4 *Serg. & Rawle*, 483.

5th. The plaintiff's title cannot rest upon the fact, that the recording of the deed was a good and effectual delivery of it, for it is disproved by the fact, that previously to that period, *John Chess* had brought an ejectment to recover the land now in dispute, by virtue of this deed. But there was no evidence that *William Chess* put the deed upon record. It was a matter of fact to be left to the jury to be judged of.

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6th. Jurors ought to be perfectly impartial between the parties. In the case of *Harper & Irvine v. Kean*, 11 Serg. & Rawle, 280, it is said, that if the testimony which the juror has given, is such as to shew, that he has formed an opinion on one side or the other, he ought to be rejected: here the juror was to testify as to a fact of great importance, and one which had created a great deal of excitement in the cause, on the one side and the other. But even if the judge who tried the cause was wrong in rejecting the juror, yet it is not a good reason for a new trial.

This is the second verdict which has been rendered for the defendants, and unless manifest injustice is done, the court will not grant a new trial. *Willis's Lessee v. Bucher*, 2 Bin. Rep. 467. *Kible's Lessee v. Arthurs*, 3 Bin. Rep. 26. *Campbell v. Spenser*, 2 Bin. Rep. 133. *Hiestor v. Lynch*, 1 Yeates' Rep. 108.

The opinion of the court was delivered by

SMITH J.—The long and warmly litigated cause of *Chess v. Chess* and others, was tried at the last circuit court, at Pittsburg, before Mr. Justice *Rodgers*, and again comes before this court for decision, on an appeal from the judgment of that court. It is a family contest, and has not only been before the court of common pleas, and the supreme court of Allegheny county, but also heretofore before the circuit court; and like most family disputes, has engendered more ill blood than is usual in other controversies: indeed, in the present instance, this has not been merely confined to the parties immediately interested, but extended, as we regret to observe, to some of the witnesses. The late trial, as well as a former one, was long and arduous, and after a most patient investigation, and an examination of many witnesses, which occupied the attention of Justice *Rogers* ten days, the cause was submitted, under his charge, to the decision of the jury. The action is an ejectment, brought by *John Chess* against *William Chess* and others, to recover the possession of about one hundred and twenty-one acres of land, a part of a larger tract, late the estate of *William Chess*, deceased, father of the parties to this suit. The plaintiff alleges, that the tract of land which he claims, was conveyed to him by *William Chess*, his father, on the 14th February, 1823, by deed. The consideration in this deed mentioned, is "natural love and affection, and one hundred dollars." The defendants allege it was not so conveyed, and claim the land as heirs at law of the said *William Chess*, deceased; so that both parties claim under the same person.

At the trial, the defendants contended, that *William Chess* was generally and partially deranged; that he was of weak mind, and a fit subject of imposition and fraud; and that such was the case when he executed the deed to *John Chess*. The plaintiff denied this,

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and contended that his father was sane at the time; and further, that even if he had been insane on the 14th February, 1823, yet, that he afterwards, at a time when he was in his perfect senses, ratified and confirmed the deed, and that therefore he is entitled to recover the land. The jury found a verdict for the defendants, and the court refused to set it aside, and grant a new trial, but rendered a judgment on the verdict, from which the plaintiff has appealed to this court, for the following reasons:—That there was error, 1st. In admitting evidence of the declarations of *William Chess*, the grantor, after the execution of the deed in question, as testified by *John Ross, William Kearns* and others. 2d. In admitting the evidence of *Samuel Thompson, Benjamin Darlington, T. B. Dallas, George Evans*, and others, in relation to the credibility of *John Ross*, whose general character had been impeached by the plaintiff, and of whose general character these witnesses had no knowledge. 3d. In the court charging the jury, that if the deed of the 14th February, 1823 was invalid at that time, it could not be made valid by any subsequent act. 4th. In the court taking from the jury the consideration of the question, whether the deed of the 14th February was confirmed by any subsequent act of confirmation, or by a new delivery at any time afterwards. 5th. In charging the jury that recording the deed was no delivery, but only evidence of it, of which jury were to judge. 6th. In sustaining the challenge, by defendant's counsel, of *William Kerr*, a juror, on the sole ground that he was a witness in the cause. The exceptions or reasons for a new trial, have been very zealously and ingeniously argued by the counsel, and many authorities have been cited.

In regard to the first reason, it may be observed, that the principle is well settled, that no one shall be permitted to invalidate his own deed by his subsequent expressions: hence it is contended by the plaintiff, that the court before which the cause was tried, erred in admitting the declarations of *William Chess*, made after the execution of the deed to *John Chess*.\* In reference to this part of the case, we ought constantly to keep in mind, what the real question before the court was, and under what circumstances the conversations of the grantor relative to other subjects, as well as to the deed, his declarations and acts, were admitted in evidence, and submitted to the jury. The insanity of the grantor was alleged on one side, and denied on the other; and the jury were called to say, whether *William Chess* was sane, or insane, on the 14th February, 1823. If, under such circumstances, I was required to decide upon the sanity or insanity of a person, I know not how I could do so, unless I was permitted to judge from his conversations, declarations and acts; these would be the only means to enable me to form a judgment. Here the defendants offered, and the court received, evidence of the conversations, the declarations and the acts of *William Chess*,

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not, as is supposed, for the purpose of verifying the facts stated in those conversations, but to shew the state of his mind—not to effect his deed—not as declarations made contrary to it, after its execution; but to shew imbecility of judgment, weakness of intellect and insanity; in short to show the true character of his understanding, on and about the 14th of February, 1823. This, and this alone, was the object of the evidence offered. The court did not decide that the declarations of the grantor, after deed made, could be received to destroy it; but expressly said, that these declarations were admissible, not as revoking his acts done, but as the means of ascertaining whether *William Chess* was sane or insane, weak or competent. On this point the parties were at issue; the defendants alleged insanity—it therefore became incumbent on them to prove it, since every one is presumed to be of perfect mind and memory, unless the contrary be proved. In this case the defendants pursued the proper course, and proceeded to prove *William Chess's* insanity, by the very index of his mind, his conversations, declarations and acts, for which purpose they examined many witnesses. The plaintiff did the same, to prove his sanity, and thus there was brought before the court a mass of contradictory evidence, all of which was fairly and legally submitted to the consideration of the jury. The judge on the trial, discovered no inclination either way; but on all the evidence, left the sanity of the testator as a mere fact to the jury, who were the judges of it. I fully agree with the counsel for the defendants, that the case of *Smith v. Irish*, so often mentioned, has placed this matter upon the true ground, and decides it. If, indeed, the evidence had been received for purposes similar to those mentioned in the numerous cases cited on the part of the plaintiff, manifest error would have intervened; the object, however, having been entirely different, the cases do not apply. We think there was no error in admitting this evidence.

In the next place it is said that the court erred in admitting the evidence of *Samuel Thompson, T. B. Dallas* and others, in relation to the credibility of *John Ross*, one of the defendant's witnesses, whose general character had been impeached by the plaintiff, and of whose general character the witnesses had no knowledge. The plaintiff, after *John Ross* had been examined in chief on the part of the defendants, called a number of witnesses to his general character in his neighbourhood, as to truth, who said it was bad. The defendants then to rebut this, and support his character, called witnesses who testified, in substance, that they had known him many years, some of them all his lifetime, but that they could only speak of his general character as to veracity, without being able to say what it was in his immediate neighbourhood; and some of these witnesses were then asked, *whether they would believe him on his oath, from what they knew of his general character?* And of this

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the plaintiff complains. He contends, that as the witnesses only knew his general character, but could say nothing of his character, *in his immediate neighbourhood*, they ought not to have been admitted to testify. I have not been able to discover any error in the admission of this evidence: indeed I thought the point here raised, had been at rest since the decision of *Kimmel v. Kimmel*, 3 *Serg. & Rawle*, 336. In that case the question was asked, "What is the general reputation of Peter Kimmel, *in the county*, as a man of truth?" which was excepted to, and the court below sustained the objection, and overruled the testimony. The supreme court, on a writ of error, reversed the judgment; and Justice *Duncan* in that case said, "character and reputation are the same: the reputation which a man has in society is his character, and where it is in issue, particular facts cannot be inquired into, nor given in evidence, nor can mere opinion." In the case cited from 11 *Serg. & Rawle*, 199, this case of *Kimmel v. Kimmel* is recognized. The question there was, whether he knew the general character of the witness? This, said the court, was strictly proper, and add, what is said *by people in general*, is the true point of inquiry; and every thing short of it is incorrect; so that we find, the witness is not strictly confined to the immediate neighbourhood of the person, but is allowed to say, what his character for truth is *in the county*, or what *the people in general* say as to his general character. In this last mentioned case it is declared, that to the question, whether the witness would believe him on his oath? a direct answer would not be objectionable, provided the belief was founded on the witnesses's knowledge of his general character, otherwise, it would not be to the purpose; though I will observe, that in practice, I have heard the single question, "would you believe him on oath?" put for thirty years and more without objection. To come then to the case immediately before us: Justice *Rogers* decided that *in attacking* the character of a witness, the proper mode was to ask the witness whether he was acquainted with the general character of the witness for truth and veracity, and whether from that general character, he would believe him on his oath? He further decided, that *in supporting* the character of the witness, the *same* mode should be pursued. The witness whose character was impeached, lived in St. Clair township, about four miles from Pittsburg, and is a man well known in Allegheny county. The witnesses who supported his character, live in Pittsburg; they had seen him often, transacted business with him, knew him well, and were acquainted with his character. With regard to the meaning of the terms, *neighbours*, *neighbourhood*, *immediate neighbourhood*, I would say, in reference to the present objection, that they were co-extensive with the range of *John Ross*' frequent intercourse with his fellow citizens, which, from the evidence, includes the county of Alle-

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gheny. On this part of the case I am authorized to state, that at the trial of the case, Judge *Rogers* was of opinion, although he did not so decide, that greater latitude is given *in support*, than in attacking character; and this I think is abundantly supported by the authorities, and by the reason of the thing. So that if there was error, it was in favour of the plaintiff who excepts. But, in our opinion, there was no error; and a new trial cannot be awarded.

I proceed to the examination of the 3d and 4th exceptions, which may be considered together. In regard to the third, I must, however, observe, that the counsel have changed the words and meaning of the judge, to make the error of which they complain. The exception is, that the jury was told, if the deed of 14th February, 1823, was invalid at that time, it would not be made valid by any subsequent act. The court did not say so—the words of the Judge are, “If *William Chess* was insane at the time of the execution and delivery of the deed, or if it was procured by imposition and fraud, the deed was absolutely *void*, and no acts or declarations of his, which have been given in evidence, would confirm it.” The meaning of the judge is evident, and cannot be misunderstood; he did not inform the jury that an *invalid* deed could not be made *valid*. The cases cited on this subject clearly establish the distinction between a *void* and an *invalid* or *voidable* deed, and that the former cannot be confirmed, though the latter may. In *Coke Litt.* 295, b. a confirmation is said to be a conveyance, whereby a *voidable* estate is made good, or a lesser estate is enlarged; but when a deed is *void*, then there can be no confirmation. In 1 *Wils.* 320, it is decided, that articles and conveyances obtained by fraud and imposition, were not made good by the subsequent acts and declarations of the grantor. So also in 15 *Johns.* 573, and *Duncan v. Findley*, 4 *Serg. & Rawle*, 483, and many more cases might be cited, establishing the same doctrine. I think Lord Mansfield somewhere has said, there could be no confirmation of a thing absolutely void; but that the acts of the grantor might operate as a new grant. Were there any such acts proved in this case? I have looked for these in the evidence, but looked in vain: they are not to be found in the evidence: (I speak here my own sentiments) on the contrary a host of witnesses proved Mr. *Chess*, the father, to be a man of weak and confined intellect, at intervals clearly insane, and at all times incapable of transacting business, unless with the advice of his family. He did not for many years before his death, manage or direct the business of his farm, but left it to others. For years, as the plaintiff’s own witnesses proved, he entertained a groundless antipathy against his wife and his eldest daughter; and some time previous to the 14th February, 1823, he went to reside with the plaintiff, who had before been advanced more than a child’s share, and whose influence over him I can hardly doubt. In short, the

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circumstances, before and at the execution of the deed, were very suspicious, and after the execution the grantor returned with John, continued with him, and subject to his influence, until near his death; during all which time, there is not any act or expression, not a whisper proved, indicating a confirmation of his deed. To me it does appear, that the condition of his intellect was no better *after*, than before or at the date of the deed; if, indeed, there was any change, it was for the worse. When he spoke of the contents of the deed, he spoke of it as containing one hundred acres and no more, although the deed contains one hundred and twenty-one acres; and we are told that the surplus of twenty-one acres is full of coal, and therefore very valuable. When and where then, I ask, did he confirm the deed? But I repeat it, if there was *actual fraud* when the deed was executed, it could not be confirmed; for it then comes directly within the principle settled in *Duncan v. Findley*, 4 *Serg. & Rawle*, 483, and since in *Yard v. Adlum*, 1 *Rawle*, 171. I cannot discover that the court took any facts, which were offered to prove a confirmation of the deed, from the consideration of the jury, to say whether the grantor was sane and of perfect mind, and free from imposition or fraud, at the time the alleged confirmation was made or not. These exceptions are not sustained.

The 5th reason is, that the court erred in charging the jury, that recording the deed was no delivery, but only evidence of it, of which the jury were to judge. In the argument on this point, the counsel, with much apparent plausibility, contended, that by our recording act of 1715, deeds of bargain and sale have the same effect as a feoffment, that enrolling is like livery of seisen, and that a deed takes effect from it. Without entering into a minute examination of the soundness of the doctrine contended for, as that appears to me not necessary, I will venture my opinion thus far, that although a feoffment, lease and release, fine, &c. are said to operate by transmutation of possession, and a bargain and sale by the act alluded to, has the same legal effect as a feoffment or release, yet *the time* when the deed of bargain and sale takes effect, is the time of actual delivery. In the evidence, I can see no proof of the delivery of the deed, or any thing to show who placed it on record; indeed, it appears to me, there is not the colour of evidence that *William Chess* took the deed to the recording office; all that is proved as to this part of the cause, being, that two or three weeks before the 1st of April, the old man came to the river, and said, "he was going to get the deed recorded;" and thus far he is traced, and no further. It was not *then* recorded, and not until about three weeks after, by whom, no one does or can say. I have examined the testimony bearing on this part of the cause, with some attention, and it appears to me, that if the deed was not delivered on the 14th February, 1823, there is no evidence, that

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it was delivered in fact at any other time. The mere reading of it is not a delivery, it is evidence only of a delivery. Delivery is requisite to the proper and legal execution of a deed, and it may be, as stated in *Shepp. Touch.* 57-58, and 12 *Johns.* 421, either actual, by doing something, and saying nothing, or else verbal, by saying something and doing nothing; or it may be by both; but by one or both of them, it must be made: for otherwise, though it be ever so well sealed and written, yet it is of no force. The delivery may be to the party, or to any one for the party, if duly authorized; or to a stranger, for the use of the party, without authority. I cannot see, in this case, any evidence of a delivery by *William Chess*. If then the deed was not delivered on the 14th February, 1823; if on that day the grantor was insane; it was incumbent on the plaintiff to show when it was delivered. He has not done so; and in the absence of proof to the contrary, the inevitable presumption is, it was delivered in fact on the day it bears date: but on that day the jury have pronounced him to have been insane, and it is therefore almost unnecessary to say, this deed could not have been legally executed. The recording of it, therefore, was no delivery; at best, it was merely evidence of delivery, of which the jury were to judge. I am accordingly of opinion, that in respect to this part of the cause, the judge charged correctly, and that, for the reason here assigned, we ought not to grant a new trial.

One exception more remains to be adverted to. It is, that the court erred in sustaining the challenge of the defendants, to a juror, on the sole ground that he was a witness in the cause. In the case of *Harper & Irvine v. Kean*, 11 *Serg. & Rawle*, 280, the cause of challenge was "that the juror had been examined before arbitrators, as a witness for the defendant;" and it is there said, that a juror is a competent witness, and that therefore it cannot be a rule, that one cannot be a juror, because he has given testimony in the same cause before another tribunal: but it is also there said, that it seems if the testimony be of such a nature, as to show that he had formed an opinion in favour of one of the parties, it ought to exclude him from the jury. And this is right. In this case the juror wished to be excused, and stated he was a witness. It did not then appear what he would prove; but it was known he was a witness for the plaintiff: and if, as it has been said, he was to be called to impeach the character of *John Ross*, who was an important witness for the defendants, and whom it was said the juror would not believe on oath, he ought to have been excluded from the jury. In delivering the opinion of this court, in a case at the last term for the middle district at Sunbury, I said, that it did not escape the discernment of our legislature, that a principle requisite to secure a due administration of justice, and fair and impartial trials, was to have jurors who were impartial and entirely free from all kind of bias,



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or the suspicion thereof; that like Cæsar's wife, they ought not only to be pure, but unsuspected. Our jury law manifestly provides for an impartial jury. What was done in this particular, in the case before us? Why a doubtful man was set aside, in a great measure upon his own request, and one not liable to any objection, substituted. Surely this was not error. In fine, we are of opinion, that a new trial ought not to be granted, for any of the reasons assigned, but that the judgment of the circuit court should be affirmed.

TOD, Justice, dissented.

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**JAMES B. M'GREW against MATTHEW M'LANAHAN, and  
SIMON DRUM.**

When land is sold upon a judgment, the sheriff must appropriate the money arising from the sale to existing liens, according to their priority, and convey to the purchaser a title free from incumbrances.

When a judgment is obtained upon one of several bonds which were secured by a mortgage, and an execution issued thereon, upon which the mortgaged premises are levied, and afterwards sold upon a venditioni exponas, before the mortgage is due, the purchaser takes the land discharged of the lien of the mortgage.

This was an appeal from the decision of HUSTON, J. at a circuit court, held for Westmoreland county.

*Mathew M' Lanahan*, one of the defendants, being the owner of a tract of land, on the 15th of April, 1815, executed a mortgage thereon, to secure the payment of eight bonds to *William Campbell*, bearing even date with the said mortgage, and each conditioned for the payment of three hundred and fifty dollars, on the 15th April, in each year thereafter, until the whole should be paid. The mortgage was recorded on the 24th January, 1817. On the 15th April, 1817, two of the mortgage bonds being due, *William Campbell* brought separate suits thereon against *Matthew M' Lanahan*, in the common pleas of Westmoreland county, to August term, 1817, and obtained judgments; writs of *feri facias*, were issued to the next term, which were levied upon the mortgaged premises; an inquisition thereon held, and the same condemned: whereupon to November term, 1818, a *venditioni exponas* issued, and the land was sold to *Simon Drum*, the other defendant, for six hundred and fifty dollars, who on the 17th February, 1819, received the sheriff's deed therefor.

After the mortgage became due, a *scire facias* was issued thereon to August term, 1824, upon which judgment was obtained on the 21st October, 1824, for two thousand and fifty-nine dollars

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and thirty-nine cents; a *levari facias* was issued to February term, 1825, and the land was sold to *James B. M<sup>c</sup>Grew*, the plaintiff, who was also the assignee of the mortgage, for fifteen hundred dollars, who received the sheriff's deed for the same on the 23d February, 1825.

It also appeared that the six hundred and fifty dollars, paid by *Simon Drum*, was more than sufficient to pay the judgments of *William Campbell*, upon which it was sold, and a small balance thereof was paid to *Matthew M<sup>c</sup>Lanahan*, the mortgagor, and *Simon Drum*, the purchaser, under the judgments obtained on the mortgage bonds.

Under the direction of the court, the jury found a verdict for the defendants. A motion was made for a new trial:

1st. Because the court erred in instructing the jury that the sale made to *Simon Drum*, upon the judgments, discharged the lien of the mortgage.

2d. Because the court directed the jury that they ought to find for the defendants, whereas their verdict ought to have been for the plaintiff.

Which motion was overruled, and the plaintiff appealed.

In this court the cause was argued by *A. C. Foster* and *Coulter* for appellant.—The cases of *Nichols v. Postlethwaite*, 2 *Yeates' Rep.* 131, and *Gurney's Executors v. Alexander*, 14 *Serg. & Rawle*, 257, establish the principle, that not only judgments against the defendant whose land is sold, but also against his vendor, and even legacies must be paid by the sheriff, out of the proceeds of the sale. But to this rule it is apprehended there are exceptions. If a junior judgment creditor sells lands sufficient to pay all prior judgments, there can be no good objection from any quarter: but if those lands are sold for a sum which is insufficient to satisfy the prior judgments; the court, on the application of those prior judgment creditors, would refuse to confirm the sale, or to permit the sheriff to acknowledge the deed. It would not be sanctioned, that the security of a judgment creditor should be swept away by one who could have no beneficial interest in the sale, or in the fund produced by it.

Two fundamental principles may be laid down, which will form a rule to decide all possible cases that can arise under a sheriff's sale. The first, which has been long established, is, that any right, however small, may be sold in Pennsylvania, for the payment of debts.

The second is, that every rule of law and equity, applicable to a sale made by an individual, is also applicable to a sale made by a sheriff. Thus if one against whom there are several judgments, sells his land for more than the amount of such judgments, the purchaser will be justified in appropriating so much of the purchase money to their payment; and it will be payment of so much

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to the vendor. If he does not thus sell, the law will interpose and sell for him, and direct the sheriff to do that which he himself might have done. If the purchaser would pay over the purchase money to the vendor, the lien of the judgments would remain; nor, if the purchaser at sheriff's sale neglects to see the money appropriated to the payment of prior judgments, will the sale, it is apprehended, discharge prior liens.

The case of a mortgage stands on stronger grounds, as respects the mortgaged property, than the rights even of a prior judgment creditor. It is considered as established law, that as between the mortgagor and mortgagee, the legal estate is in the latter, and the equity of redemption in the former. The right of the mortgagee to sustain an ejectment upon the mortgage deed, and recover the possession of the land, that the executing of a mortgage by one joint tenant, severs the joint tenancy; and other cases prove, that the common law construction and effect of a mortgage is recognized in Pennsylvania, and is unaffected by the remedy afforded by our statute.

What more can be levied on a *fi. fa.* than the equity of redemption? It is all the right, title, interest and claim, of the defendant. Could he sell more by private sale, or would any thing more pass from him by any deed he could make? And, it may be asked with great confidence, can the sheriff sell any greater estate than the defendant had?

This question arose in the case of *Patterson for use v. Sample, 4 Yeates 308*. There the mortgage was recorded 13th March, 1801, more than six months from its date, but before the judgment, which was entered 14th November, 1801. The mortgaged land was sold under a judgment for eight thousand dollars. An application having been made to the supreme court on appeal from the circuit court, that court expressly declared, "that the mortgagee had a plain simple remedy, by proceeding in the usual way on the mortgage." This decision cannot be misunderstood; and if it is authority, is conclusive of this cause, unless the circumstance of the judgment upon which the land was sold, being obtained upon a bond which was secured by the mortgage, should alter the case: and it is not easily discoverable how that can be.

In *McCall v. Lenox, 9 Serg. & Rawle, 308*, the present C. J. expressly says, if the mortgagee "proceeds as a judgment creditor on the bond, he may instantly have execution of the mortgaged premises, to the extent of the equity of redemption." And *Duncan, J.* was of opinion, "that when there was a judgment for one entire debt, secured by a mortgage, and the mortgaged premises sold, the purchaser acquires all the title of the mortgagor:" yet he excepts from this general doctrine, the case of several bonds, given to the same person, secured by the same mortgage. The plaintiff is therefore not without authority on his side. In the case of *Lenox v.*

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*M'Call*, judge *Duncan* says that the case in 11 *Johns. Rep.* 462, *Jackson v. Hall*, where the land sold for seventy dollars, and had been mortgaged for seven hundred dollars, was determined upon principles of strict law, arising from the disparity of price and real value. But how dangerous it would be to render the law thus uncertain! If any weight ought to be attached to such a circumstance, it would apply with its fullest force to this case, where the land was sold for less than one fourth its value. The authority of the case in 11 *Johns.* is not in any degree shaken by the case in 2 *Johns. Chan. Rep.* *Tyer and Aiken v. Anon*; it is, indeed, confirmed. It is true the chancellor intimates certain supposed inconveniences that may arise from the sale of an equity of redemption; yet in that case, although the land was levied on, and not the equity of redemption by express terms, he considers it nevertheless as only the equity of redemption, and decrees accordingly: and the suggestion that he might hereafter issue an injunction to prevent the sale of the equity of redemption, (from its supposed injury) would apply as well to a case where, in express language, the equity of redemption was levied on, as where it followed from natural and legal construction.

The acts of Assembly in relation to sales under judgments, only give such title to the purchaser as the defendant had at the time the judgment was obtained; and the circumstance of its having been obtained upon a mortgage bond, can not alter the law. In the argument of the case of *Banileon v. Smith*, 2 *Bin. Rep.* 146, Mr. *Hopkinson* and Mr. *Rawle* say, "it is analogous to the case of a bond and mortgage, in which an execution and sale, *under the bond*, has never been supposed to extinguish the plaintiff's lien."

*J. B. Alexander* for appellees.

The opinion of the court was delivered by

*SMITH, J.*—The question which is presented for the decision of this court is; whether the purchaser of the land, sold under the *levari facias*, issued on the judgment obtained on the *scire facias* on the mortgage, for several of the instalments due on the land, can recover in an ejectment, the possession of the land from the mortgagor and the purchaser of the same land, sold to him by the sheriff, under an execution issued on a judgment, obtained in the action brought to recover the amount of one of the bonds, the payment of which was secured by the same mortgage, when the said judgment had been obtained, execution issued, and the land sold, *before action was brought, or judgment rendered*, on the mortgage for said subsequent instalments.

At the circuit court held last August by justice *HUSTON*, for the county of Westmoreland, he instructed the jury, that the sale of the land, on the judgment in the suit on the bond, extinguished the right of the plaintiff to sell the same land again, on the mortgage: that *Simon Drum*, the purchaser at the first sheriff's sale, bought the

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estate, and held it freed and discharged from this mortgage, and that the last sale to the plaintiff was void, and vested no interest in him. The jury found, accordingly, for the defendants, and from this decision the plaintiff appealed to this court.

In the case of judgments, it certainly has been an ancient practice, and is now a settled rule, for the sheriff, when land has been sold by him on a judgment, to appropriate the money proceeding from the sale, to existing liens, according to their priority, and to convey to the purchaser, a title free from incumbrances. See 1 *Bin.* 97. 3 *Bin.* 358. 1 *Serg. & Rawle*, 320. 7 *Serg. & Rawle*, 290. 14 *Sergt. & Rawle*, 257. In the case of *Nicholls v. Postlethwaite*, 2 *Dall.* 131, decided at a court of *Nisi Prius*, at Carlisle, the court even directed *legacies*, charged on the land of the defendants, by his devisor, to be paid. And the case of *Gurney's Executor v. Alexander*, 14 *Sergt. & Rawle*, 257, clearly goes to establish the principle, that not only judgments against the defendant, but judgments against his vendor, which were a lien on the land, should be paid out of the money arising from the sale of the defendant's land.

The case of *McCall v. Lenox*, 9 *Serg. & Rawle*, goes far to decide the present question. In that case, chief justice *Tilghman* remarked upon the practice in this state, to sell land for its full value, without regard to liens, and apply the proceeds of the sheriff's sale, to the discharge of liens according to their priority. And in a case of *Glass v. Gilmore*, decided by this court in Lancaster, at May term, 1829, and not yet reported, justice *Rogers*, in delivering the judgment of the court, said, "as respects sales, made by the sheriff, it has been already decided, that the lien of judgments, and even legacies, charged on lands are divested; that the judgment creditor and legatee, must look to the sheriff for their money, as the purchaser is not bound to see to the application of the purchase money."

But it is contended, that the rights of a mortgagee, stand on higher grounds than those of a prior judgment creditor. I confess I cannot see why they should; nor have they, in adjudged cases on this subject, been so considered. Although mortgages in form are conveyances of lands, yet in substance, they are only securities for the payment of money; and the debt being once paid, or extinguished, the mortgage is considered as at an end. Between the mortgage and the bond, there is, as judge *Duncan* expresses it, an inseparable union; the bond is the principal, the mortgage an incident to it, incapable of existing without the debt, of which the bond is the original security. How then, when the land is sold for the very debt secured by the bond, can the rights of mortgagees be considered as standing on higher grounds, than the rights of prior judgment creditors? The bond and mortgage are securities for one and the same debt, to recover which, the mortgagee has three remedies; he may proceed by ejectment, and recover the premises; by *scire facias* on the

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mortgage, or on the bond, by an action of debt; if he proceed by *scire facias*, or by action of debt, on the bond, he may recover the debt by a sale of the land. The mortgagee has his election to proceed in either way, and having seen proper to proceed on the bonds, or one of them, and have the land sold, the very substance itself, it would be wholly incongruous and unjust, to permit him to proceed to a second sale on a *scire facias*, of the same substance. Such double proceedings are incompatible, and repugnant to the spirit and policy of our law. The land cannot be twice sold. If by this proceeding on *one* of the bonds, the mortgagee has been injured, or a loss has been sustained, it is his own fault, by not proceeding directly on the mortgage; to prevent injury to others, the mortgagee must so deal with his security, as not to work injustice. These principles have been established by former decisions, particularly that in the case of *McCall v. Lenox*, 9 *Serg. & Rawle*, 302. But the question was put at rest by this court, at the last session at Sunbury, in June, in the case of *Millard and Adams v. Norris*. In that case, the land had been sold by the sheriff, without any reservation or mention of incumbrances. The question was, whether a purchaser at sheriff's sale, under a judgment, held the land freed and discharged of the lien of a mortgage, prior to the judgment; and it was decided that in this state, the usage had been, if there was not an express reservation, that the title and lien of a prior mortgage were divested, and extinguished by a sheriff's sale of the land on a younger judgment. The opinion delivered in that case, by Justice *Tod*, entered into a full examination of all the cases. We are, accordingly, of opinion, that the decision of the circuit court was right, and that the judgment be affirmed.

Judgment affirmed.

### TERRENCE M'GIRR against GEORGE AARON.

A gift to a charity shall not fail for the want of a trustee, but vest as soon as the charity has acquired a capacity to take.

T. B. in his last will made the following devise—"I give and bequeath all my real estate, to wit, &c. to a Roman Catholic priest that shall succeed me in this said place, to be entailed to him and to his successors, in trust, and for the use herein mentioned, in succession, forever, &c. &c. and further, it is my will, that the priest for the time being, shall transmit the land so left him as aforesaid, to his successor, clear of all incumbrances as aforesaid," &c. Held that the devise was for the maintenance of a priest, but in case of the congregation, and for its benefit alone. And the congregation is entitled to take the profits in the first instance, but subject to a right in the priest, to have them applied to his support.

This was an ejectment originally brought, in the court of common pleas of Westmoreland county, and removed by *habeas corpus*

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*cum causa*, to the circuit court of the same county, where it was tried before *Huston*, Justice.

The plaintiff, an inducted Roman Catholic priest, on the trial of the cause, claimed the premises in controversy, two tracts of land in Westmoreland county, as answering the description of the devisee under the will of the Rev. *Theodorus Browsers*, dated the 23th October, 1790, and duly proved in the register's office.

The only part of the will which is material to an understanding of the case is as follows:

Item, I give and bequeath all my real estate, viz: my place on which I now live, called "Sportsman's Hall," and one other tract of land on Loyalhanna creek, called "O'Neal's Victory," with their appurtenances, to a Roman Catholic priest, that shall succeed me in this said place, to be entailed to him and to his successors, in trust, and so left by him who shall succeed me, to his successors, and so in trust, for the use herein mentioned, in succession, forever; and that the said priest, for the time being, shall strictly and faithfully say four masses each and every year, forever, viz: one for the soul of the Rev. *Thodorus Browsers*, on the day of his death, in each and every year, forever, and three others the following days in each year as aforesaid, at the request of the Rev. *Theodorus Browsers*; and further, it is my will, that the priest, for the time being, shall transmit the land so left him in trust as aforesaid, to his successor, clear of all incumbrances as aforesaid, and I nominate, constitute and appoint *Christian Reffner*, and *Henry Coons*, executors to this my last will and testament, this twenty-fourth day of October, in the year of our Lord, one thousand seven hundred and ninety.

After the death of the testator, the congregation, (under the impression that a devise to an officiating priest, and his successors, not being a corporation sole, was against the policy of the law, and void, as tending to a perpetuity, and therefore the legal title would escheat to the commonwealth,) applied to the legislature to make a provision, by which the intention of the testator should be carried into effect, which produced the act of the 7th March 1821, vesting the title in several trustees of the congregation, and their successors; who leased the same to *George Aaron*, who is the defendant in this suit. In the circuit court, according to the opinion of the judge who tried the cause, the jury found a verdict for the defendant.

The plaintiff, by his attorneys, *Alexander W. Foster*, *John B. Alexander*, *Joseph H. Kuhns*, and *James Nichols*, Esquires, moved the court for a new trial, for the following reasons:

1st. The court, on the trial of the said cause, erred in directing the jury, that the Rev. *Terrence M'Girr*, the plaintiff in said cause, (admitted and proved to be the successor of the Rev. *Theodorus Browsers*, in the pastoral office,) was not entitled to the possession of the tract of land in dispute, called "O Neal's Victory," under the

(Terrence M'Girr v. George Aaron.)

will of the said *Theodorus Browsers*, and of the act of assembly of the 7th of March, 1821.

2d. The court, on the trial of the said cause, erred in directing the jury, that the devise, in the last will and testament of the Rev. *Theodorus Browsers*, of the two tracts of land, called "Sportsman's Hall," and "O Neal's Victory," was intended for the benefit of the congregation, and that the trustees of the congregation, appointed under the act of assembly of the 7th of March, 1821, were entitled to retain the possession, against the successor of the Rev. *Theodorus Browsers*.

3d. The court, on the trial of the said cause, erred in directing the jury, that the plaintiff, the Rev. *Terrence M'Girr*, though admitted and proved to be the successor of the Rev. *Theodorus Browsers*, in the pastoral office, was not entitled to recover in ejectment against the lessee of the trustees of the congregation, appointed under the act of the 7th of March, 1821, the tract of land called "O Neal's Victory."

Which motion was overruled by the court, and the plaintiff appealed from the decision.

*Nichols, Foster and Alexander* for appellants.

*Coulter* for appellee, whom the court declined to hear.

The opinion of the court was delivered by

GIBSON, C. J.—The plaintiff, an inducted Roman Catholic priest, claims the premises, as answering the description of the devisee in the will of the Rev. Mr. *Browsers*. The defendant holds under a lease from trustees appointed by a private act of assembly, to execute the trusts of the will, before the congregation had obtained its charter of incorporation. Neither party doubts the right of the plaintiff to have the profits applied to his maintenance; and the contest is, consequently, about the right to the immediate management of the estate. Were the devise interpreted strictly according to the meaning of the words, it would be impossible to carry the intention of the testator into effect, for want of trustees to perpetuate the application of his bounty to the successive objects of it. A devise to an officiating priest and his successors, not being a corporation sole, is against the policy of the law, and void, as tending to a perpetuity; and this was the reason, I presume, why the legal title, which it was supposed had escheated to the commonwealth, was vested in trustees for the uses declared in the will. But we are to interpret this devise as if the legislature had not interfered; and we can prevent it from failing of effect for want of a trustee, only by holding, in accordance with what, notwithstanding the literal meaning of the words, was undoubtedly the actual intent, that the devise was for the maintenance of a priest, *but in case of the congregation*; and consequently for its benefit alone. Now, although the congregation was not incorporated at the death of Mr. *Browsers*,



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yet by the decisions of the court, a gift to a charity shall not fail for the want of a trustee, but vest as soon as the charity has acquired a capacity to take. But before the congregation had acquired that capacity, the legislature had vested the title in trustees, under whom the defendant claims. It is unnecessary to inquire into the consequences of this act, as the legislature interfered no farther than to vest in those trustees whatever might have escheated to the commonwealth, without at all meaning to alter the trusts in the will. But there was in fact no escheat, the gift being sustainable on principles defined in former decisions of this court; and consequently there was nothing on which the act could operate. That matter being disposed of, it follows that the congregation, either as having itself the legal title, or as standing in the relation of *cestui que trust*, to the lessors of the defendant, is entitled to take the profits in the first instance, but subject to a right in the plaintiff to have them applied to his support; and the exceptions to the verdict, therefore, are not sustained.

Judgment affirmed.

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The COMMONWEALTH against the administrators of PATRICK FARRELY, deceased.

The account of a public officer, settled by the Auditor General, and approved by the State Treasurer, and duly certified by the Auditor General, to be a true copy from the records of his office, is, *prima facie*, sufficient evidence to enable the commonwealth to recover the balance due by such officer, in a suit brought on his official bond against his surety.

WRIT of error to Crawford county, to remove the record of a suit, brought in the court of common pleas, by the *Commonwealth* against the *Administrators of Patrick Farrelly*, deceased.

The defendants intestate, *Farrelly*, was one of the sureties of *Richard Bean*, in a bond to the commonwealth, in the sum of four thousand dollars, dated 8th February, 1819, conditioned that the said *Bean*, who had been commissioned Brigade Inspector of the sixteenth division Pennsylvania militia, by commission dated 15th October, 1818, should faithfully execute the duties of said office, and among other duties, "should from time to time, well and truly account for all moneys which may come to his hands, in virtue of said office, and pay over any balance which may be ascertained by the proper authorities to be lawfully due by him." A breach was assigned in the declaration, that moneys had come to the hands of the said *Bean*, to the amount of six hundred and twelve dollars and forty-five cents, as per account passed by the Auditor General and State Treasurer, 17th March, 1820, which he had refused to pay over, &c.

(The Commonwealth v. the administrators of Patrick Farrelly, deceased.)

Pleas by defendant: That *Bean* had not broken the condition of the said bond, and covenants performed; replications by plaintiffs and issues.

On the trial, the commonwealth's counsel gave in evidence the bond, and the following account duly certified under seal, by the Auditor General, to be a true copy, taken from the records of his office, viz:

*Richard Bean*, Inspector, 2d brigade, 16th division, to the commonwealth of Pennsylvania Dr. For amount of fines returned by his predecessor, *William Clark*, late inspector of said brigade viz:

William Shannon, constable, fines of 1815,	\$32	50
Andrew Clark, do. do. 1816,	29	95
George Kelly do. do.	88	00
Abraham Looper, do. do.	1	00
Thompson Clark, do. do.	38	00
George Kelly, do. spring do. 1817,	172	00
Henry Stewart, do. do.	77	00
Thompson Clark, do. do.	64	00
Thompson Clark, do. fall do.	54	00
Abraham Looper, do. do.	56	00

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\$612 45

Settled and entered, *Geo. Bryan*,  
Auditor General's office, 17th March, 1820.

Approved and entered, *Richard M. Crain*,  
Treasury office, 17th March, 1820.

Here the plaintiff closed: and the court below instructed the jury, "that the account was not of itself sufficient to shew a forfeiture of the bond." To which opinion the plaintiff's counsel excepted, and in this court assigned the same for error.

*Derrickson*, for the commonwealth.—After referring to the act of 28th March, 1814, relative to the duties of a Brigade Inspector, and the act of the 30th March, 1811, *Purd. Dig.* 690, *Tit. Public Accounts*, which directs the mode of settling officers' accounts by the Auditor General and State Treasurer, and contending that the account was not only *prima facie* evidence, but conclusive upon *Bean* and his surety, was stopped by the court, who desired to hear the counsel on the other side.

*S. B. Foster* for defendant in error.—Contended, that as the account consisted entirely of fines and forfeitures, which accrued previous to *Bean's* coming into office, it was a charge for which his predecessor only was liable, unless the commonwealth would shew by testimony *dehors*, the account and certificates of the Auditor General, that the money had actually come into *Bean's* hands: that

(The Commonwealth v. the Administrators of Patrick Farrelly, deceased) the bond was not to have a retrospective but a prospective operation, and that the bail consequently could not be liable. He cited 9 Wheat. Rep. 680. 9 Cranch Rep. 212. }

The court would not hear *Derrickson* in reply, and reversed the judgment of the court below.

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JAMES M'BRIDE *against* WILLIAM HOEY.

IN ERROR.

A purchaser of unseated lands, sold for the payment of a direct tax, in pursuance of the act of Congress, and having in his possession a deed from the collector, who was authorized to make the sale, has such a right as will authorize him to redeem the same lands, from a person who had purchased them at a treasurer's sale, for taxes, made in pursuance of the act of assembly.

*William Hoey*, who was the plaintiff below, brought this action of ejectment in the court of common pleas of Mercer county, to recover from *James M'Brice*, a tract of land, No. 41, in the third donation district, containing five hundred acres.

The plaintiff claimed title by virtue of a deed made to him by the treasurer of Mercer county, on a sale for taxes; and in order to show the sale by said treasurer, gave in evidence the assessment of a county and road tax upon the land, for the year 1820; the assessment of a road tax for the year 1821, and the sale book furnished by the commissioners to the treasurer; and then offered the deed from the treasurer to the plaintiff, *William Hoey*, and his bond to the treasurer, for the surplus purchase money, after the payment of the taxes due upon the land. The defendant objected to the evidence of the deed and bond, because the plaintiff had not shown that a county tax had been assessed on the land for the year 1821, and the bond was for too small a sum by three dollars and fifty cents; therefore, the deed was void. The evidence being admitted by the court, the defendant excepted to the opinion.

The defendant then offered in evidence a receipt of the treasurer of Mercer county, to *William Clark*, for twenty-seven dollars and three and a quarter cents, dated within two years of the time of the sale to the plaintiff, and which was paid to redeem the said land: and in order to shew that *William Clark* had a right to redeem, offered in evidence a deed from *Theophilus T. Ware*, collector of the revenue in the 10th District of Pennsylvania, to *William Clark*, for said tract of land, dated 3d July, 1821: which evidence was objected to by the plaintiff, and rejected by the court, who sealed a second bill of exceptions.

A verdict and judgment were rendered for the plaintiff.

(James M'Bride v. William Hoey.)

It was here assigned for error, that the court below admitted the evidence mentioned in the first bill of exceptions, and rejected that mentioned in the second.

His honor the chief justice, mentioned that the opinion of the court upon the validity of the treasurer's sale to the plaintiff below, had been formed upon a former argument of the cause, and now desired the counsel to confine their remarks to the second bill of exceptions.

*Bredin and Baldwin* for plaintiff in error.—Any person having a claim, or equitable interest in land, which has been sold for taxes, may redeem it by complying with the provisions of the act of assembly, for that purpose; as a judgment creditor, mortgagor or mortgagee; a tenant in common, or heir at law for his co-tenant or co-heir; a son for his father, or an agent for his principal. But any one who has colour of title, has clearly a right to redeem: here *Clark*, the claimant under the deed from *Ware*, had at least a colour of title, and such a one as would entitle him to hold the five hundred acres by the statute of limitations, although but a small part of the tract may have been actually cleared and occupied. Even if he had no deed, his bare possession was a sufficient title to authorize him to redeem. It is immaterial to the purchaser at the treasurer's sale, who redeems, provided the taxes, and costs, and his money, and twenty-five per cent. thereon, are paid to him.

*Banks and Pearson* for defendant in error.—The deed and receipt were not evidence. In ejectment, in Pennsylvania, a defendant may rest upon his possession; he may shew title in himself, or in a third person, but in doing so, he must make out that title by the usual and well established rules of evidence; and the title thus relied on, must be a good subsisting title at the time: the deed of an individual is not evidence until title is shown in the grantor. *Lessee of Peters v. Condron*, 2 Serg. & Rawle, 83. *Hone v. Long*, 10 Serg. & Rawle, 10. A sheriff's deed is not evidence against a stranger, until the judgment and execution are shown. *Lessee of Wilson v. McVeagh*, 2 Yeates' Rep. 87. *Run. on Eject.* 117. *Weyand v. Tipton*, 5 Serg. & Rawle, 332. Title must also be shown in the person as whose property it was levied and sold. *Little v. Delancey*, 5 Bin., 270. *Kennedy v. Bogert*, 7 Serg. & Rawle, 98. A treasurer's deed is not evidence, unless the treasurer's authority for making sale is first shewn. *Blair v. Waggoner*, 2 Serg. & Rawle, 472. *Birch v. Fisher*, 13 Serg. & Rawle, 208. *Waln v. Shearman*, 8 Serg. & Rawle, 359. *Stewart v. Shoenfelt*, 13 Serg. & Rawle, 371-2.

No one but the owner at the time of the sale can redeem; such is the provisions of the law itself: the sale vests the title of the real owner in the purchaser, who holds that title defeasable in a certain way, and by the owner alone. The doctrine contended for by the counsel for the plaintiff in error, would enable a person not holding title, to divest a good title, which cannot be the law. The pur-

(James M'Bride v. William Hoey.)

chaser gives a bond for the surplus above the amount of the taxes and costs, for the use of the owner of the land: the owner has a vested interest in that bond; can a stranger avoid his right to its amount? Could he give a receipt for it, which would protect the purchaser against the owner? Could he recover from the purchaser the amount of the bond? Certainly not: and he cannot do indirectly, what he cannot do directly: he cannot cancel the bond, by redeeming the land, when he cannot do it by receiving the amount thereof, or releasing the obligation. The owner, upon the redemption of the land, may sustain his action of ejectment against the purchaser. It will not be contended that the title here shown, or rather offered in evidence, would enable the plaintiff in error to sustain his action. If a defendant depends on his title, or that of a third person, he must shew such an one as would enable him or them, if plaintiffs, to recover the land, otherwise it will not protect him in the possession.

The judgment was reversed, and a *venire facias de novo* awarded.

**CASES**  
**IN**  
**THE SUPREME COURT**  
**OF**  
**PENNSYLVANIA.**

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CHAMBERSBURG—OCTOBER TERM, 1829.

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**WELSH against BEKEY, Executor of HAYDEN.**

**IN ERROR.**

A mortgage of personal property, without a delivery of possession, or the other *indicia* of ownership, is fraudulent as to creditors: and upon the death of the mortgagor, the mortgagee is not entitled to a preference over the other creditors, to have his debt first paid out of the proceeds of the mortgaged property.

WRIT of error to the court of common pleas of Franklin county.

The plaintiff in error was plaintiff below in this action, which was entered to try whether *Jacob Welsh* was entitled to the proceeds of the sale of certain personal property of *Richard Hayden*, deceased, to the amount of his debt, in preference to the other creditors of said deceased, upon the following statement of facts, to be considered in nature of a special verdict:

On the 7th January, 1825, *Richard Hayden* was the owner of two farms, upon one of which he resided, together with a cropper, who farmed the land; the other was in the possession of a tenant, who farmed it upon the shares: when, in consideration that the said *Jacob Welsh* would loan to the said *Richard Hayden*, the sum of two hundred dollars, the following agreement was entered into between them:

"Articles of agreement made and concluded the 7th January, 1825, between *Richard Hayden*, of the township of Washington, county of Franklin, and state of Pennsylvania, of the one part, and *Jacob Welsh*, of the township, county and state aforesaid, of the other part, witnesseth: That whereas the said *Richard Hayden* has this 7th January, 1825, received from the said *Jacob Welsh* an order on *John Fullerton* for the sum of two hundred dollars, which sum, when

(Welsh v. Bekey, executor of Hayden.)

received by the said *Hayden*, from the said *Fullerton*, the said *Hayden* is to allow the said *Welsh* six per cent. for the use of the said money until paid; and as security to the said *Welsh*, for the true and faithful payment of said sum of two hundred dollars and interest, the said *Hayden* doth assign, transfer and set over unto the said *Jacob Welsh*, and to his heirs, the one half of forty-eight acres of wheat and rye, now in the ground, on the plantation where the said *Hayden* now lives, and the one half of forty-six acres of wheat and rye, now in the ground, on the land of *Ross's* heirs, where *John Young* now lives; all which grain in the ground shall be and remain bound for the payment of the said sum of two hundred dollars and interest; the said *Hayden* is to take care of said grain, keep the same under good fence, and from being destroyed by horses and other cattle, and cut and haul and thrash the same; and the said *Welsh* shall have his money out of the price thereof, which shall be at his direction, and under his controul until he is paid, and so soon as he is paid, then this article to be void and of none effect.

“Witness our hands and seals the day and year aforesaid.”

Signed,

*Richard Hayden*, [SEAL.]  
*Jacob Welsh*. [SEAL.]

Witness, *John Flanagan*.

On the 14th September, 1825, *Richard Hayden* died: the grain on the farm on which *Hayden* and his cropper lived, was cut and remained on the farm till he died, when *Jacob Bekey*, his executor, took possession of it, and sold it. The grain on the farm on which *Young* lived, remained in his possession till after the death of *Hayden*, when it was thrashed, and by him delivered to *Bekey*, who sold the same. The proceeds of the sale of the said grain in the hands of *Jacob Bekey*, is more than sufficient to pay the claim of the plaintiff, *Jacob Welsh*, if he is entitled to a preference. The estate of said *Hayden* is insufficient for the payment of all his debts.

Upon this statement of facts, the court below, (*Thompson* president,) entered judgment for the defendant, which was assigned for error in this court, and argued by

*Chambers*, for the plaintiff in error, who said, that the only question was whether the transfer was void, in consequence of the possession of the grain not having been delivered to *Jacob Welsh*, at the time of the assignment.

The transfer was good to effectuate the intention of the parties.

1st. Because the agreement did not contemplate an immediate delivery of the thing transferred.

Whether the possession of goods remaining in the hands of the vendor is a badge of fraud, depends upon the intention of the parties. 1 *Dane's Ab. of Amer. Law*, 659. There must be fraudulent or deceptive purposes in view, in order to make it void. *Ib.* 639. In the case of an absolute sale, the possession remaining in the vendor

(Welsh v. Bekey, executor of Hayden.)

is inconsistent with the agreement, but, in this case, the possession remaining in the assignor was consistent with the agreement, and therefore valid. *Clow v. Woods*, 5 *Serg. & Rawle*, 276. 2 *Stark. Ev.* 616. *Barrow v. Paxton*, 5 *Johns. Rep.* 258.

2d. Inasmuch as the grain was not susceptible of delivery at the time the transfer was executed, the transaction was not fraudulent, nor the transfer void under the statute of 13 *Eliz. chap. 5* : but a reasonable time after harvest should be allowed for the delivery, which was not allowed in consequence of the death of *Hayden*, on the 14th September, 1825. In the cases of vessels at sea being transferred, a reasonable time is allowed after their arrival for delivery. *Morgan v. Biddle*, 1 *Yeates*, 3. When *Hayden* died, *Welsh* was entitled to the lease of the land, or his money out of it, and therefore, when *Bekey* received the money, he received it for the use of *Welsh*, and should account for it in this action.

3d. The possession of the grain never was in *Hayden*, but in his tenants, and therefore the want of a delivery at the time of transfer to *Welsh*, was not even *prima facie* evidence of fraud; for creditors in that case would, in the exercise of a reasonable prudence, inquire further about the ownership, than the mere appearance of possession.

4th. This transfer is sustainable, on the ground that it was the assignment of a rent, and therefore of a chose in action. In this case, the farm was leased on the shares, and that share was a rent for which the landlord might destrain. *Dorsey v. Jackman*, 1 *Serg. & Rawle*, 52. *MS. case, decided at Sunbury, June 7, 1829.*

5th. Although this transfer may have been void against creditors, yet it is conclusive against *Hayden*, his heirs, executors and administrators, and the defendant being his executor, cannot sustain this defence. It does not appear by the special verdict that there is any creditor who has qualified himself to make this defence; the validity of the transfer could not be questioned by a creditor, until he has obtained a judgment and execution for his debt. 3. *Amer. Dig.* 309. Cited, *Gilpin v. Davis*. 2 *Bibb*. 416. *Kentucky Rep.*

*Cramford*, for defendant in error.—It does not appear by the agreement, that the possession of the grain was not to be delivered; on the contrary, a fair construction of it is, that *Welsh* was, at its execution, to be placed in *Hayden's* situation respecting it, and he was to have merely a supervision over the grain, that it might be preserved for *Welsh*.

The possession might, in some degree have been delivered; the agreement might have been recorded; notice might have been given to the tenant that he was to consider *Welsh* as his landlord, as to this grain. Two months elapsed from the harvest of this grain, till the death of *Hayden*, within which time, possession of the grain, in the sheaf or in the bushel, might have been delivered.



(*Welsh v. Bekey, executor of Hayden.*)

The transaction was, in its character deceptive. *Hayden* resided on the land, and after the execution of this agreement, may have derived credit from the public upon the faith of this grain, which appeared to be his. The transaction is open to all the objections which exist against the validity of a transfer of personal property, without a delivery of possession.

The agreement is not an assignment of rent, nor was it intended by the parties to have operated as such. It is nothing more or less than a mortgage of the grain, and so designed; for according to its own terms, it was to be void upon the re-payment of the money.

The case of *Cloe v. Woods*, 5 *Serg. & Rawle*, 276, seems to be conclusively in point with this case. The delivery of possession is as necessary to the validity of a mortgage of goods, as of an absolute sale. *Cunningham v. Neville*, 10 *Serg. & Rawle*, 22, where it is also said that the case of *Barrow v. Paxton*, in 5 *Johns. Rep.* 258, is not sound law. It is a part of the case that the estate of *Hayden* is insolvent: this is therefore virtually a contest with the creditors.

*Chambers*, in reply.—The statute of the 13th *Elizabeth*, provides against *contrivances* to defraud, delay or deceive creditors; and therefore if the whole transaction shews that the parties had *no intention* to defraud or deceive, it is a valid transfer. 2 *Stra. Ev.* 621.

The opinion of the court was delivered by

GIBSON, C. J.—This transaction was evidently intended to be a mortgage of personal property, which, when the mortgagor retains the possession, or the other *indicia* of ownership, was declared in *Clow v. Woods*, to be fraudulent, as in the case of an absolute sale. That the rule which was recognized in that case, rather than established, for the first time, ought not to be relaxed on grounds of policy, is proved by the fact, that a sham sale, to elude creditors, has become the common and successful instrument of fraud; so much so, indeed, as to have nearly superceded in practice, the old abuse of the remedy under the insolvent laws. That rule is, however, founded, not merely in policy, but early established authority. In a leading case, which is frequently appealed to, (*Ryall v. Rolle*, 1 *Wils. Rep.* 260.) a partner in a brewery mortgaged his share in the brewhouse, *utensils and debts*, but continued to carry on the business as before; and it was held that a mortgagee of goods or choses in action, being the true owner, ought to take actual possession, as far as he can, of the goods, or the key of the warehouse, and of the muniments by which the choses in action may be recovered. How closely that case resembles this, will be perceived. *Hayden* assigns to *Welsh* the moiety of a crop growing on the farm where he resides, and the moiety of another crop on the farm where his tenant resides, to remain bound for the re-payment of two hundred dollars; and it is stipulated "that *Hayden* shall take care of the crop while growing, cut, thrash and carry it away, under the

(Welsh v. Bekey, executor of Hayden.)

direction and control of *Welsh*, who is to have his money out of the price of it." The argument that the assignment is of a rent in the nature of chose in action, is without force, granting the fact to be so; because the assignment of a chose in action itself, is subject to the rule which requires a transfer of the possession. Did the parties leave undone that which might serve to indicate the actual owner? Instead of substituting the mortgagee for the mortgagor, and providing for a transfer of the possession as soon as it might be delivered, consistently with the bargain with the cropper, it was expressly stipulated that the mortgagor should retain the crop till it should be sold by the direction of the mortgagee, who was to have possession of nothing but the proceeds of it. Taking care of grain, growing, reaping, thrashing and selling it, include all the notorious acts of ownership that are ordinarily exercised in relation to this species of property; while the act of giving directions, is a matter usually known only to the parties. There was not one open and notorious act to be done by *Welsh*, that would indicate him to be the owner, or that would be inconsistent with the apparent title of *Hayden*. The fact is, the parties undertook to mortgage the property, just as if it were a tract of land; and, notwithstanding the admitted purity of their intentions, we are bound to say, the transaction cannot be supported. In reply to the argument that the contract, although fraudulent as to third persons, is good between the parties, it is proper to remark that the contest with the executor is virtually a contest with the creditors, it being expressly made a part of the case that the estate is insolvent.

Judgment affirmed.

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### SHUMAN and FURST against PFOUTZ.

#### IN ERROR.

A Justice of the Peace has power to supercede an execution issued by him: and such superedeas will exonerate the constable from liability.

An execution issued upon a judgment out of the Court of Common Pleas, is not removed into this court, unless specifically mentioned in the præcipe and writ of error.

This court will not hear the first allegation of error, in the taxation of a bill of costs; the motion to correct the error must be first made in the court below.

This was a writ of error to the common pleas of Perry county.

*Shuman* and *Furst*, the plaintiffs in error, had a judgment against *Hopple*, upon the docket of justice *Utter*: an execution was issued, and put into the hands *Pfoutz*, the defendant in error, then constable of the township, who made a levy upon the personal property of *Hopple*, after which he received a written notice from justice *Utter*, directing him to restore the property levied to *Hopple*, and

(Shuman and Furst v Pfoutz.)

return his execution, which he did. *Shuman* and *Furst* then sued him for so doing, and claimed the amount of the property so levied; the cause came into the common pleas by appeal, where a verdict and judgment was rendered for the defendant, upon the charge of the court to the jury, "that the order of the justice to the constable, and the acceptance of the return by him, in the absence of fraud, did acquit the defendant from legal liability."

Two errors were assigned in this court:

1st. The court erred in their charge to the jury.

2d. An execution issued for more costs than were recoverable by the defendant in the court below.

*Creigh* for the plaintiff in error.—A *certiorari* is not a *supercedeas* to an execution unless bail is given by the plaintiff, which was not done in this case, nor even then, if a levy has been made before the issuing of the *certiorari*. The debt of the plaintiffs, *Shuman* and *Furst*, was then secured by a legal proceeding, to wit, the levy upon personal property; and the justice had no legal authority to take away from them that security. And if the order of the justice to the constable was without authority, it does not exonerate him from liability. *Boyer v. Potts*. 14 *Serg. & Rawle*, 157. *Purd. Dig.* 455. 12th sec. of the act of 20th March, 1810.

2d. The execution issued for the costs of the original suit of *Shuman* and *Furst* against *Hopple*, for which there was no judgment in this suit, which was manifest error.

*Alexander* for defendant in error.—The case of *Sherby* against *Fisher*, decided by this court at the last term, and not yet reported, determines this case, that the order of the justice is a justification of the constable.

The writ of error does not bring up the execution, unless specially mentioned in the writ; but, at all events, this court will not hear the first motion to correct an error in the taxation of costs; the motion must be first made in the common pleas.

The opinion of the court was delivered by

SMITH, J.—In consequence of an execution issued by justice *Utter*, at the suit of the plaintiffs, against a certain *D. C. Hopple*, on the 15th June, 1821, the constable, (the defendant *Pfoutz*), made a levy on a quantity of hay, and some household furniture of *Hopple*. On the next day, the 16th June, 1821, *Samuel Utter*, the justice, by a written notice to the constable, directed him, in case he had levied on the property of the defendant, to restore the same to him, and return the execution. The constable did so; and a suit was then brought against him, "for," as the record states, "the amount of the levy on the above stated execution;" which, on an appeal, was finally tried on the 8th June, 1828, and a verdict and judgment rendered for the defendant. At the trial, the court below charged the jury "that the *supercedeas* and acceptance of the return by the

(Shuman and Furst v. Pfoutz.)

justice, in the absence of all alleged fraud, or imposition, did acquit the defendant of legal liability." To this charge the counsel of the plaintiff excepted, and has assigned two errors in this court. 1st. That the court erred in their charge to the jury. 2d. That the execution issued for costs that could not be recovered in this suit, (they not being costs of this suit.)

We are decidedly of opinion that, in the above stated charge of the court to the jury, there was no error. I take it, a justice has a right to withdraw or supercede an execution issued by him; if he could not, it would lead in many cases to injustice, and draw the constable into difficulties. Suppose an execution has been issued before the stay of execution is out, or more than a year elapses before it has been issued, or the amount of the judgment is actually paid to the plaintiff, without the knowledge of the justice, or the defendant should die, and the justice did not know of his death; or it should be issued perhaps to the wrong constable, by mistake; or special bail should, under the act, be entered; or an appeal taken within the time limited, or should be otherwise erroneous; will it be contended that the justice cannot recall the execution, and that the constable must, at all hazards, go on with the execution, and render himself and the justice responsible? I should think it cannot. The very question now submitted was, I think, fully considered and decided by this court, at their last term held for this district, in the case of *Sherby v. Fisher*, in which justice *Tod* delivered the opinion of this court. In that case *Fisher* had sued *Sherby*, a constable, for not returning an execution which had been placed into his hands by a justice; this execution was recalled and withdrawn by the justice out of the power and possession of the constable after he had made a levy; and the question was, whether the constable was liable. This court held that the constable was not liable, and that he was not to inquire into the reason of the justice for recalling the execution; but as the act of assembly, in more than one case, required an execution to be returned, as where special bail was entered in time, or an appeal taken in twenty days, the justice could supercede the execution, and the constable would not be liable. I presume the case will be reported; and to the opinion delivered in that case, I refer for the reasons which governed this court.

As to the second exception, I would observe, that the execution is not before us, but if it was, this court has already decided that we will not take cognizance of an exception which depends on matter of fact. The court below should have been applied to, in the first instance, to tax the bill of costs. It does not appear that this was done, but we are now asked to set aside the execution because it issued for costs that were illegal; if it had so issued, the court below, on application would have corrected it. In this case we are of the opinion that the judgment should be affirmed.

Judgment and execution affirmed.

[JOHN CLIPPINGER, Esq. late Sheriff of Cumberland county,  
against ROBERT MILLER, Assignee of LYON and WEB-  
STER.

## IN ERROR.

The revival of a judgment by an amicable *Scire Facias Port Annum et diem* creates a lien upon the real property of the defendant, acquired after the entry of the original judgment.

A *scire facias* continues the lien of a judgment upon land, although the occupiers, who are lessees from year to year of the defendant, have not had the writ served upon them.

THE facts of this case were presented to the court of common pleas of Cumberland county, in the shape of a special verdict, which was removed to this court by the defendant below by a writ of error.

Robert Miller, assignee of  
Lyon and Webster,

v.

John Clippinger, Esq. high  
sheriff of the county of  
Cumberland.

In the court of common pleas of Cum-  
berland county.

The following facts are agreed on by the parties to be considered in the nature of a special verdict; either party to be at liberty to take a writ of error within twenty days after judgment may be rendered, but not afterwards. 22d. September, 1804, *Lyon v. Webster* obtained judgment against *John Creigh Jun. and John Creigh, Sen.* in the circuit court of Cumberland county, No. 8. of March term, 1804, for five hundred and thirty-two dollars and eleven cents. On the record of this judgment, the following entry was made, "*Eait Amicable scire facias*, No. 57, to August term, 1817."

1st. May, 1817. The following agreement was signed by *A. Carothers*, Esq. as attorney for Doctor *John Creigh*, and filed of record in the court of common pleas of Cumberland county: "*J. S. Webster*, surviving partner of the late firm of *Lyon & Webster v. Doctor John Creigh*, surviving *John Creigh*, Esq. deceased. Amicable *scire facias P. A. et D.* to revive judgment. *Lyon & Webster v. John Creigh, Jr. and John Creigh, Sen.*

"I, as attorney for the defendant, agree to appear to this amicable *scire facias* as of August term, 1817. (Signed,) *A. Carothers*.

"1st May, 1817."

In the appearance docket of the court of common pleas of Cumberland county, to August term, 1817, are the following entries:

(John Clippinger, Esq. late sheriff of Cumberland county, v. Robert Miller, assignee of Lyon and Webster.)

John S. Webster, surviving partner of the late firm of Lyon & Webster, v.

Doctor John Creigh, surv. John Creigh, Esq. dec.

"No. 57, August term, 1817.

"*Am. sci. fa. P. A. et D.* to revive the judgment Lyon & Webster against J. Creigh, Jun. and J. Creigh, Sen. May 1st, 1817, per agreement filed, as narr."

"Judgment."

"Origl. No. 8, March, 1804, circuit court."

"Eait *Am. sci. fa.* No. 108, August term, 1822."

6th June, 1822, the following agreement was signed by Doctor John Creigh, and filed of record in the common pleas of Cumberland county, 7th June, 1822:

"*Lyon & Webster, v. John Creigh, Esq.* Amicable *scire facias* to revive judgment in the court of common pleas of Cumberland county. I appear to the above *Am. sci. fa.* to revive judgment, and confess judgment thereon to the plaintiff, deducting the following payments, viz: two hundred dollars on 7th March, 1818, one hundred dollars on 1st August, 1818, one hundred dollars on the 10th August, 1818, and two hundred dollars on 28th April, 1820.

Carlisle, 6th June, 1822.

John Creigh, [SEAL.]

Attest, Geo. A. Lyon."

Under the authority of this last agreement, the following entry was made on the docket:

Lyon & Webster

v.

John Creigh, Esq.

"No. 108, August term, 1822.

"*Am. sci. fa.* to revive judgment in the court of common pleas of Cumberland county, 6th June, 1822. The defendant appears to this *Am. sci. fa.* and confesses judgment thereon to the plaintiff, deducting the following payments, to wit: two hundred dollars, March 7th, 1818; one hundred dollars, 1st August, 1818; one hundred dollars, 10th August, 1818; two hundred dollars on the 28th April, 1820, as per agreement filed.—Entered 7th June, 1822. Origl. 57, August term, 1817.

"Judgment."

"Eait *Am. sci. fa.* No. 20, August term, 1827."

28th April, 1827, Doctor Creigh signed the following agreement:

Lyon & Webster

v.

John Creigh, Esq.

In the court of common pleas of Cumberland county. *Am. sci. fa.* to revive judgment, No. 108, of August term, 1822. I appear to the

above *Am. sci. fa.* and confess judgment thereon in favour of plaintiff, as of this date. Witness my hand and seal, the 28th day of April, A. D. 1827.

(Signed,) John Creigh, [SEAL.]

The docket entry of the above is as follows, viz:

Lyon & Webster

v.

John Creigh, Esq.

No. 20, August term, 1827.

In the court of common pleas of Cumberland county, *Am. sci. fa.* to revive judgment. The defendant, by his agreement in writing, dated 28th April, 1827,

(John Clippinger, Esq. late sheriff of Cumberland county, v. Robert Miller, assignee of Lyon and Webster.)

appears to the above *Am. sci. fa.* and confesses judgment to the plaintiff. (Agreement filed as narr.)

Entered 30th April, 1827.—Origl. 108, August term, 1822.

“Judgment.”

At the time of the entry of the judgments in favour of *Lyon & Webster, v. John Creigh, Jun.* and *John Creigh, Sen.* on the 22d September, 1804, *John Creigh, Jun.* and *John Creigh Sen.* each had real estate amply sufficient to pay the judgment, which estates were then unincumbered. *John Creigh, Jun.* yet holds the same estate he held on the 22d September, 1804, the time *Lyon & Webster's* judgment was entered, and *John Creigh, Sen.* held his until his death, and on the 1st of May, 1817, *John Creigh, Jun.* was residing in his own house, in Landisburg, and the estate which he owned at that time, which now lies in Cumberland county, was occupied and possessed by tenants.

In 1814, Doctor *John Creigh* and *Andrew Mateer* purchased a tract of land in Silver Spring township, Cumberland county, for something above twelve thousand dollars, containing two hundred and thirty acres, more or less, which they held as tenants in common, until March, 1828, when it was sold by sheriff *Clippinger*, as hereinafter stated. Between 1812 and 1814, Doctor *John Creigh*, became entitled, as one of the heirs of *John Creigh, Esq.* deceased, to the one fifth of a house and lot in Carlisle; one fifth of a piece of land in South Middleton township, containing ninety-two acres, about two miles from Carlisle; the one fifth of another piece of land, about one mile from Carlisle; and the one fifth of an out lot of five acres, which he held until sold last year by sheriff *Clippinger*, as hereafter stated. Between the years 1800 and 1815, Doctor *John Creigh* acquired the following property in that part of Cumberland county which now composes the county of Perry, to wit: a lot of ground in Landisburg, with a log house on it; a brick house and lot of ground in Landisburg; one fifth of a tract of land, containing about three hundred and seventy acres, in Tyrone township, all of which he yet holds, though incumbered by judgments against him in Perry county, to more than their value, which judgments were entered since the 16th September, 1823, the time of the judgment in favour of the commonwealth for use, &c. v. *Andrew Mateer, John Creigh, and Henry Quigley.*

16th September, 1823, judgment was entered against *Andrew Mateer, John Creigh, and Henry Quigley*, in the common pleas of Cumberland county, at the suit of the commonwealth of Pennsylvania, for the penalty of a bond given by defendants to the commonwealth, by direction of the court of common pleas of Cumberland county, to secure the repayments of moneys received by *A. Mateer* and *John Creigh*, as administrators *pendente lite* of *John Huston*, deceased.

(John Clippinger, Esq. late sheriff of Cumberland county, v. Robert Miller, assignee of Lyon and Webster.)

A *sci. fa.* issued on this judgment, in favour of *Huston's* executors, on the 11th April, 1827, a verdict was given in the circuit court of Cumberland county, against *A. Mateer, John Creigh* and *Henry Quigley*, executors, for fifteen thousand six hundred dollars. On this *sci. fa.* and on the 3d of November, 1827, judgment was rendered on said verdict, by the supreme court against *John Creigh* and *Andrew Mateer*, generally, and with leave to take out execution against the lands of *Henry Quigley*, which were bound by the judgment entered on the 16th September, 1823.

On 21st March, 1828, *John Clippinger*, Esq. sheriff of Cumberland county, sold the following property on a *vend. exps.* issued out of the circuit court of said county, at the suit of *Huston's* executors v. *John Creigh* and *Andrew Mateer*, No. 2, of March term, 1828, viz: A tract of land in Silver Spring township, Cumberland county, containing two hundred and thirty acres, sold as the property of *John Creigh* and *Andrew Mateer* to *William Ramsey*, Esq. for four thousand dollars. A tract of land, containing one hundred and twenty acres, sold as the property of *Andrew Mateer* to *William Ramsey*, Esq. for two thousand dollars. A tract of land, containing nineteen acres, with a forge seat, sold as the property of *A. Mateer*, to *William Ramsey*, Esq. for one thousand dollars. A tract of land, containing two hundred and fifty-four acres, sold as the property of *A. Mateer* to *William Ramsey*, Esq. for three hundred and fifty dollars. A lot of ground sold as the property of *A. Mateer*, to *William Ramsey*, Esq. for seventy dollars. Two lots of ground, sold as the property of *A. Mateer* to *William Ramsey*, Esq. for one hundred dollars. A lot of ground, sold as the property of *A. Mateer* to *William Ramsey*, Esq. for fifty dollars. The one fifth part of a house and lot in Carlisle, sold as the property of Doctor *John Creigh* to *John D. Creigh*, Esq. for three hundred and fifty dollars. The one fifth part of fifty acres of land within a mile of Carlisle, sold as the property of Doctor *John Creigh* to *John D. Creigh*, Esq. for one hundred and fifty-one dollars. The one fifth part of a five acre lot, sold as the property of Doctor *John Creigh* to *John D. Creigh*, Esq. for thirty dollars.

If upon the within and foregoing statement of facts, the court shall be of opinion that *Huston's* executors, or those claiming under them, are entitled to receive the proceeds of the sales made by sheriff *Clippinger* of Doctor *Creigh's* interest in the properties mentioned, to the exclusion of *Lyon & Webster*, or those claiming under them, then judgment is to be entered for the defendant. But if the court should be of opinion that the judgment in favour of *Lyon & Webster* is entitled to a preference, and that the balance due thereon should be paid out of the moneys arising from the sales of Doctor *Creigh's* interests in said properties so as aforesaid, made by sheriff *Clippinger*, then judgment is to be entered in favour of the



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plaintiff, for four hundred and one dollars and twenty-three cents, with interest from the 30th September, 1828; being the balance due on *Lyon & Webster's* judgment, after deducting three hundred and fifty dollars paid by sheriff *Clippinger*, in April, 1828, out of the moneys arising from the sales made of Doctor *Creigh's* property to *John D. Creigh*, Esq. as within stated.

After argument, the court of common pleas, (*Reed* president,) gave judgment for the plaintiff, which was assigned for error in this court.

*Watts* for plaintiff in error.—Three propositions which arise out of the facts in this case, are contended for by the plaintiff in error:

1st. That the revival of a judgment by an *Amicable scire facias P. A. et D.* does not create a lien upon the property of the defendant, acquired after the original judgment was entered.

2d. That no *scire facias* either creates or continues a lien upon land, unless the terre tenants or persons occupying the lands, are made parties to the same, or have the writ served upon them.

3d. If the plaintiffs are entitled to the moneys now in dispute, *Huston's* administrators are entitled to an assignment of their judgment, which is a lien upon lands, which the judgment of *Huston's* administrator's is not.

In order to understand the consequences and effects of a judgment upon a writ of *scire facias*, it is necessary to know what it contains, and what it demands. It contains a recital, that a judgment had been obtained at a certain term, which yet remains unsatisfied, and demands that the defendant shall appear and shew cause why execution should not issue; the judgment can be for nothing but what the writ demands; it is "the sentence of the law, pronounced by the court upon matters contained in the record." It does not partake of the nature of an original action, in regard to the extension of the lien of the original judgment. When money is loaned by one man to another, and the lender takes a judgment for the amount, he does it upon the faith of the property which the borrower has at the time; and policy does not require that the security should be increased. Although it has been said by our judges, that a *scire facias* partakes of the nature of an original action, for certain purposes; yet if a judgment upon it embraces in its lien land not originally bound, there is no particular in which it differs at all. In the case of *Calhoun v. Snyder*, 6 Bin. 135, *Yeates*, justice, speaking of judgment, says, "The lien attaches at the moment of entry, and I can have no idea of its shutting at one period and opening at another, so as to embrace, of itself merely, property not originally bound. Its effects are immediate, and must be known and ascertained, when the judgment is given, and cannot depend upon subsequent events, unless it has been so provided by positive law." And in the case of *Fries v. Watson*, 5 Serg. & Rawl.

(John Clippinger, Esq. late sheriff of Cumberland county, v. Robert Miller, assignee of Lyon and Webster.)

220, Chief Justice Tilghman says, "I know that in strictness, a *scire facias* is not an action, but a demand of execution;" and when speaking of its object, he says, it is "the obtaining the fruits of the original judgment." "The effects of a *scire facias* is to enforce a lien." *Morton v. Croghan*, 20 Johns. Rep. 106. 7 Serg. & Rawle. 328. 1 Peter's Rep. 446-9.

The third section of the act of, 4th April, 1798, seems to be conclusive of this point. It is alone by the authority of this act, that the lien of a judgment can be continued: and it provides that the *scire facias* shall be served upon "the terre tenants or persons occupying the real estate bound by the judgment, and on the defendant: the whole act provides for the continuance of a lien upon land, already bound; the legislature never seeming to contemplate that any other than the lands originally bound, should be embraced within the operation of the writ of *scire facias*."

The act of assembly provides that "all such writs of *scire facias*, shall be served on the terre tenants or persons occupying the real estate bound by the judgment, and also, where he or they can be found, on the defendant or defendants." In this case it is expressly found that the lands, out of which the money now in dispute was made, was in the possession of tenants, and that the writs of *scire facias* were not served upon them. 2 Saund. 7 n. 9, is the authority cited in the case of *Cahoon v. Hollenbach*, for the position, that occupiers are not terre tenants. In England, I admit it is so; but our act of assembly is in its terms positive; and if those terms be disregarded, the proceeding is ineffectual.

Huston's administrators and Lyon and Webster, are both creditors of John Creigh; we have but one fund out of which our debt can be paid; they have two, and ask, in this suit, to take the only fund which can be appropriated to the payment of our debt. If the two first points should be against us, the court will direct their judgment to be assigned to us, that we may be enabled to collect our debt out of the fund upon which we have now no lien.

Lyon and Carothers for defendant in error.—The lien of a judgment obtained upon a *scire facias post annum et diem*, is not limited to the land bound by the original judgment: to authorize such a limitation of the lien, the *scire facias* must be special, praying execution only of those particular lands, as in *scire facias* on a mortgage; or the judgment of the court must be specially so entered. Where that is not the case, the judgment entered must be considered a new general judgment, with all the incidents and qualities of a judgment obtained in action of debt on a bond. A defendant may plead to a *scire facias*, and make as full defence as he could upon a summons; it has therefore been considered an action in law; and in a late case, *Allen v. Reesor*, 16 Serg. & Rawle, 14, the court decided that a *scire facias* on a recognizance in the

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orphan's court, was sustainable as being substantially an action of debt. There is nothing in the opinion of judge *Yeates*, in 6 *Bin.* 125, that militates against the doctrine contended for by the plaintiffs; we admit that a judgment cannot shut at one period, and open at another so as to embrace of *itself merely*, property not originally bound; but we contend that through the medium of an amicable suit of *scire facias* founded on the original judgment, and a new judgment entered on that in 1817, the plaintiff obtained a lien, which did embrace all the land which the defendant had at that time. It cannot be pretended that a *fi. fa.* partakes at all of the nature of an action; nor can it be denied that the object of a *Testatum fi. fa.* is to obtain the points of the judgment on which it issued; yet by these writs a plaintiff may acquire a lien on land not bound by the original judgments. *Cowden v. Brady*, 8 *Serg. & Rawle*, 505. There would be no principle of law violated, or rule of equity abridged, by attaching to a judgment on a *scire facias*, all the consequences of a judgment upon an original action. On the contrary, such a decision would be in exact accordance with the spirit and letter of our acts of assembly, which direct that "judgments shall bind the real estate of defendants from their dates," and that "all the goods and chattels, lands and tenements of debtors, shall be subject to execution." The doctrine contended for by the plaintiff in error, is not only contrary to every sound rule of construction, but it is subversive of the universal practice of our courts; such a doctrine would involve sheriffs in inextricable difficulties in the distribution of the proceeds of real estates of defendants, when different properties of the same defendant are sold.

On the second point it need only be remarked, that in the case of *Cahoon v. Hollenbach*, 16 *Serg. & Rawle*, 432, the third section of the act of the 4th April, 1798, limiting the lien of judgments, was fairly before the court, and by the decision made in that case, a construction has been given to that section which is at once safe and convenient, and in perfect accordance with the invariable practice and understanding of the profession. If the letter of the act were to be complied with, according to the common understanding of the word "occupants," every sub-tenant from year to year, or at sufferance, of every room in the house or cabin on the land, must be summoned. The defendant and those holding the fee under him, are the only persons whose rights could be affected by the want of notice; and they alone, says chief justice *Gibson*, are entitled to notice.

On the third point, it need only be remarked, that the principle of substitution contended for by the plaintiff in error, cannot apply to this case. If there were no other creditors of *Dr. Creigh* but the parties to this cause, the rule would apply; but there are other creditors who are not parties to this issue, and who would be

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affected by such substitution. If the creditors in both counties have the same equity, the law must decide between them.

*Ramsay* in reply.—The *scire facias* of 1817 specifies no sum, and the *scire facias* of 1822, is to revive the judgment of 1817, and mentions no sum to be due by the defendant to the plaintiffs. If, therefore, it should be contended that the irregular judgment of 1817, was of itself a good judgment, without relation to the judgment of 1804, but is in the nature of an original action, it is void for uncertainty, and the court cannot tell how much was recovered in that suit by the record itself. And if it is a *scire facias* to revive the judgment of 1804, and *continue* its lien, it cannot embrace subsequently acquired property. *Philadelphia Bank v. Craft*, 16 *Serg. & Rawle*, 348.

The opinion of the court was delivered by

ROGERS, J.—Two questions arise in the case stated. First, whether the revival of a judgment, by *Amicable scire facias post annum et diem*, creates a lien upon the property of the defendant, acquired after the original judgment.

And, secondly, whether a *scire facias* continues the lien upon the land, the terre tenants not having been made parties, no writ having been served upon them.

The first question has been virtually decided in *Berryhill v. Wells*, 5 *Bin.* 56, and in *Fries v. Watson*, 5 *Serg. & Rawle*, 220. In some respects we have departed from the English law, and the difference has arisen from the construction of an act of assembly, making interest an incident to a judgment. The cases referred to, go on the ground, that a judgment on the *scire facias* is not a mere revival of the original judgment, but partakes of the nature of a new judgment, and the court assimilates it to the case of a judgment rendered in an action of debt on the original judgment. We cannot perceive any good reason why a difference in the remedies should make any difference in the right. If the plaintiff had brought an action of debt, instead of a *scire facias*, the land would have been bound. And we believe a judgment on the *scire facias* places the plaintiff on precisely the same footing. In strictness it is true, a *scire facias* is not an action, but the object of the two remedies is the same—the obtaining the fruits of the original judgment. It is in the nature of an original action; and to say, that as to the recovery of interest, it should be considered as a judgment in an original action, but not so in other respects, would be introducing a distinction, attended, as far as we can perceive, with no beneficial results.

By tenants, is meant the owners of the fee-simple, and by occupiers, those who come in under them. 2 *Saund.* 7 n. 9. And in this sense, the terms are used in the third section of the act of 1798.

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When the tenant in fee is known, and within reach of the process of the court, the legislature intended he should have notice: on him the *scire facias* should be served, for he, and he only, is entitled to notice, who will be prejudiced by the judgment. The act of assembly is in the alternative. The *scire facias* must be served on the terre tenants or occupiers of the land; by which expressions, I do not understand the legislature to mean, that terre tenants and occupiers are one and the same, but as intending to provide for the service of notice, on the persons occupying the land, where the owner of the fee simple is unknown, or not within reach of the process of the court. The tenants do not make any complaint of want of notice; if their rights were affected, they would be entitled to a hearing; but the judgment would cease to be a lien, only so far as their interest was concerned. A contrary exposition of this act, would be attended with great inconvenience; for if you were obliged to serve notice, at the risk of losing your lien, on all the occupiers of land bound by a judgment, (which is a general lien on all the real property a man possesses,) it would be extremely troublesome and very expensive. And in accordance with this opinion, has been the universal understanding. It has not been considered necessary, where there has been no transfer of the property by the defendant, to bring in any person but the defendant himself. When there has been an alienation or sale of the property, it is right that the party to be affected should have an opportunity of making defence, *pro interesse suo*; for preventing the risk and inconvenience to purchasers of real estate, seems to have been the principal object of the act of the 4th April, 1798.

I cannot perceive any similarity between this case, and the case of the *Philadelphia Bank v. Craft*, 16 Sergt. & Rawle, 348. There it was contended, that it was a final judgment, without any sum being ascertained, either directly or by reference. We did not mean to interfere with judgments which referred to a sum ascertained and fixed. By applying the maxim, *id certum est, quod certum reddi potest*, there is no difficulty in ascertaining the amount found in the judgment on the *scire facias*.

The application to the court to be substituted, &c. we think premature, as the persons to be affected by it, are no parties to this proceeding.

Judgment affirmed.

JACOB GARDNER, plaintiff in error, *against* JACOB LEFEVRE,  
administrator of RACHAEL ESPY, defendant in error.

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A writ of error will not lie upon an order of the Court of Common Pleas overruling a motion to strike off an appeal, and setting aside an execution, supposed to have been improvidently issued.

ERROR to the court of common pleas of Adams county.

A motion was made to quash the writ. It appeared from the record, that an action of replevin had been brought by *Jacob Lefevre*, as administrator of *Rachael Espy*, for goods of the intestate, alleged to be in the hands of the defendant. A rule of reference was entered by the defendant, under the compulsory arbitration law, and after hearing, a report was made in favour of the defendant. He filed his bill of costs, and gave notice to the plaintiff, that he would not consent to an appeal, without the payment of his costs. An appeal was entered by the plaintiff's attorney, without such payment. And after the twenty days had elapsed, an execution was issued against the plaintiff *de bonis pro priis* for the costs, returnable to April term, 1829. A rule was entered at the instance of plaintiff, to shew cause why the execution should not be set aside; and a motion was also made on behalf of the defendant, to strike off the appeal, on the ground that the cause of action was in the plaintiff, *not as administrator*, but in *his own right*. Upon hearing both motions, the court set aside the execution, and refused to strike off the appeal. To this decree of the court, the present writ of error was taken.

*Miller*, for the defendant in error, contended, that this writ could not be sustained, because there was no final judgment of the court below, and that the cause was still pending and undetermined in the common pleas.

*Stevens*, for the plaintiff in error, maintained, that the entry of the appeal was a nullity. That the action was personal, and could only be sustained in the name of the plaintiff in his own right, and the addition of administrator was mere surplusage. That an oath, recognizance, and payment of costs, were necessary pre-requisites to the entry of an appeal, and they having been dispensed with after notice, the mere act of entering an appeal by plaintiff's attorney, is a nullity, and may be disregarded.

By THE COURT.—The cause is still pending in the court of common pleas. There is no final judgment: the writ of error must therefore be quashed.

| ELLIOTT *against* SANDERSON.

## IN ERROR.

A writ of error will not lie to remove a judgment in the Circuit Court to the Supreme Court, in any case in which the party might have had a remedy by appeal.

THIS record was brought up on a writ of error to the circuit court of Cumberland county, where it was a suit brought by the defendant in error, *Sanderson*, against the plaintiff in error, *Elliott*, and in which a verdict was rendered for the plaintiff below; the defendant filed reasons for a new trial, and made a motion in arrest of judgment, which were overruled by the judge who tried the cause, and judgment was entered, whereupon the defendant appealed, in pursuance of the act of assembly; but the appeal not having been entered upon the records of the supreme court, until after the return day for the district, it was quashed. The defendant then sued out this writ of error, which

*Carothers*, for defendant in error, moved to quash, on the ground that a writ of error will not lie to the circuit court, in any case, where the party might have had a remedy by appeal.

*Penrose*, for plaintiff in error.—The error which it is alleged is contained in this record, does not consist in any thing which occurred upon the trial in the circuit court, but other errors manifest upon the face of the record.

*Carothers*, in reply.—The error now alleged would have been a good reason in arrest of judgment, which motion was made and overruled, and the defendant appealed.

Writ of error quashed.

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 THOMAS CHAMBERS *against* JONATHAN MIFFLIN.

## IN ERROR.

A precisely descriptive warrant must be followed up with reasonable attention, in order to give title from its date. So of a vague warrant, from the time of survey.

If an owner of a vague or removed warrant, has suffered it to remain unreturned for more than twenty-one years, and during that time has exercised no act of ownership upon the land, the state or any person has a right to consider it as derelict, and whoever purchases and pays for the land, under such circumstances, has a good title.

Query.—Whether the law is not the same in some cases, as to precisely descriptive warrants.

THIS was a writ of error to the common pleas of Franklin county, to remove the record and judgment of that court, in an action of

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ejectment brought by *Jonathan Mifflin*, the defendant in error, against *Thomas Chambers*, the plaintiff in error. In the court below the verdict and judgment were for the plaintiff, *Mifflin*.

The claims of the respective parties were as follows. The title of the defendant in error and plaintiff below, *Jonathan Mifflin*, originated upon a warrant granted to *Robert Long*, dated 15th April, 1763, for two hundred acres in *Black's Gap*, in the South mountain, including some springs, supposed to be the head waters of the Conococheague creek, in Cumberland county. It was not conceded by the defendant below that a survey had ever been made on this warrant, but it appeared in evidence, that in 1776 and afterwards, applications were entered calling for lands adjoining *Robert Long*, and in 1792, a warrant, in which it was alleged Captain *Benjamin Chambers* had an interest, was taken out, calling for *Robert Long*. No survey was returned on this *Robert Long* warrant, until April, 1797, and so far as could be ascertained, no draft of any survey had been in the office of the deputy surveyor of the county. *Robert Long* conveyed to *Jonathan Mifflin*, by deed dated 20th July, 1796, and he obtained a patent from the commonwealth, 14th February, 1812.

The plaintiff in error, *Thomas Chambers*, claimed under a warrant to *George Chambers*, dated 29th December, 1792, for two hundred acres, at the Shippensburg fork of Conococheague creek, on both sides of the great road from Chambersburg to York. On the 5th of April, 1793, a survey was made on this warrant, and returned soon after. Some proof was given that at the time this survey was made, the father of the plaintiff in error knew of the survey of *Robert Long*. There was a regular chain of title from the warrant to the plaintiff in error, *Thomas Chambers*.

On the 19th July, 1793, *Long* and *Mifflin* exhibited to the board of property, a draft of a survey of this land, and their warrant, and the board granted them an order of re-survey, and directed the deputy surveyor to make a return, noting the interference, if any, with any other claim. After this, to wit, 12th April, 1797, a draft of a survey on *Robert Long's* warrant, dated 4th April, —, and signed for *John Armstrong*, by *William Lyon*, was taken to the surveyor general's office, and was accepted by the surveyor general, and filed. Soon after this, a copy of the order of the board of property before mentioned, was sent to the deputy surveyor of the county, included in which was a copy of this draft by *William Lyon*.

*John Armstrong* had not been deputy surveyor since 1776. Nothing was done in pursuance of this order of the board of property.

No actual improvement was made upon the land until about the year 1808. This suit was brought in 1825.

Several errors were assigned in this court, to the charge of the court below to the jury. Those that are material to the decision made by this court, are as follows:



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The court erred in saying, "that if *Benjamin Chambers* had notice of the survey on *Long's* warrant, the delay of the deputy surveyor to return the survey, will not affect the plaintiff's title, whether that delay proceeded from neglect of the officer, or the omission to pay the fees.

In not directing the jury, as requested, that *Long* was guilty of negligence in not causing the survey to be returned, and that such omission was calculated to mislead and impose on purchasers from the commonwealth.

In not directing the jury as requested, that if *Long* withheld his survey from the office, for the purpose of keeping it open for change, it would have no validity against a person knowing it, until after the return and acceptance.

In not instructing the jury that they might presume that *Long* had abandoned his survey as made.

*Crawford*, for the plaintiff in error.—A warrantee, after he has procured his warrant, has certain duties to perform; he must provide chain carriers and provision, and he must pay the fees of the deputy surveyor, to entitle him to have his survey returned: and if any of these duties are omitted, by reason of which his warrant is not duly executed, and his survey returned, such omission will affect his title; and the court erred in laying down the law differently to the jury. *Fisher v. Larick, et als* 3 *Serg. & Rawle*, 321. *Boyles v. Kelly*, 10 *Serg. & Rawle*, 217, *Lessee of Lauman v. Thomas*, 4 *Bin.* 59. And in all these cases, the paying of the fees of the deputy surveyor is treated as a matter of necessity.

The direction of the court, that an abandonment could not be presumed, particularly as the plaintiff had his survey returned, and a patent issued upon it, was erroneous. *Boyle's v. Kelly*, 10 *Serg. & Rawle*, 217. *Watson v. Gilday*. 11 *Serg. & Rawle*, 340. But it was calculated to mislead the jury; for the survey of the plaintiff was not returned till 1797, three or four years after the defendant's survey was made and returned, and his patent did not issue for nineteen years afterwards.

*Dunlop*, for defendant in error.—The warrant to *Robert Long*, is not a shifted warrant, but a vague one, calling for land in *Black's Gap*, and it is laid upon land as high up the waters called for in the description, as it could be, without going out of the county of Cumberland. The difficulties of the cause are removed by the conclusion that our warrant is a vague one. *Moore v. Shaver*, 6 *Serg. & Rawle*, 130. *Lilly v. Paschal*, 2 *Serg. & Rawle*, 394.

Even if it was a shifted warrant, it is sufficiently proved that captain *Chambers* had notice of the survey. The jury believed and found accordingly, either that the warrant was vague, or that captain *Chambers* had notice; that he did know of *Long's* survey is certain, from the fact, that another survey of his called for *Robert Long's* survey on the south; and although this warrant and sur-

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vey is in the name of *Joseph Chambers*, yet all the circumstances in the cause shew that captain *Chambers* was part owner of it. All the adjoining surveys made at the time call for *Robert Long*. The court charged the jury in favour of the defendant on this point, for they said that captain *Chambers* must have had notice prior to the commencement of his title, to be effected by *Long's* title.

*McCulloch* on the same side. The request to the court to charge the jury, that the conduct of *Long* was calculated to mislead and impose on purchasers, was a question of fact and not of law, and therefore this court will not reverse the judgment, even if the court below were wrong in their opinion.

The return of a survey is but notice to every body of the appropriation of the land included within that survey; if therefore captain *Chambers* knew of *Long's* survey, this knowledge as to him, was tantamount to a return and acceptance.

There is no such thing known in the history of the land titles of Pennsylvania, as gathered from our books, as the doctrine that a jury can presume the abandonment of a warrant upon which money has been paid. The doctrine of abandonment only applies to improvement rights or locations, where no money has been paid; and in those cases it may be presumed, because the giving up of possession is giving up every thing which the improver had; but where money is paid, it cannot be presumed that it is abandoned. It has been decided in the case of *Mitchell v. Mitchell*, 4 Bin. 180, that when money has been paid on a warrant, the commonwealth has no right to vacate that warrant.

*Chambers*, in reply.—The warrant of *Robert Long* was not intended for the land in dispute, but for land including the springs and head waters of the Conococheague creek. A right founded upon a shifted warrant and survey is an imperfect right, until it is returned and accepted, for until then the warrantee might change his survey and lay it upon other lands; or the proprietaries might refuse to accept it, having previously given no assent to the appropriation of the particular lands surveyed.

This imperfect right, therefore, which either party may change, until the survey is accepted, is such a right as may be abandoned. And the only difference between the presumption of an abandonment of an improvement or location, when little or no money is paid, and of a warrant where money is paid, is in the amount of evidence required to support the presumption in one case and the other.

If *Long* had once abandoned the land, he never could renew his claim afterwards to the prejudice of another, who had taken out an office right.

The extent of our request to the court was not to instruct the jury that there was an abandonment, but, "that the jury may presume from the facts that there was an abandonment."

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The opinion of the court was delivered by

HUSTON, J.—(Here his honour recapitulated the facts in the cause.)—In the argument of this case here, and I may suppose in the court below, all the cases on precise, vague and removed warrants were cited. See *McKinney v. Houser*, 2 *Smith* 190. *Duncan v. Curry*, 3 *Bin.* 14, and *Lauman v. Thomas*, 4 *Bin.* 58. See also 3 *Serg. & Rawle*, 321-2. 10 *Serg. & Rawle*, 17. 15 *Serg. & Rawle*. 224. *Maus v. Montgomery*.

And if this suit had been brought forty years ago, or if the title of defendant below, had commenced within a few years after the plaintiff's, there would have been no error perhaps in the charge. By recurring to those cases in which this matter has been discussed, it will appear, that in *Lauman v. Thomas*, the plaintiff's warrants were dated 27th of April, 1774, surveyed in May, 1774, when returned, was uncertain; but certainly before the 12th January, 1792, when a patent issued. The defendant's title commenced in December, 1774, and his patent in 1776. In 3 *Serg. & Rawle*, 321, one title was the 3d of April, 1769, surveyed in 1772, the other a warrant in 1772. In *Duncan v. Curry*, both titles were dated 3d April, 1769, one surveyed in 1771, the other in 1774, and not returned until after 1795, and was clearly postponed.

In short, all those cases presented something very different from the present.

There was at one time but little difference in the titles, and in most of them some possession or ownership was alleged to supply the want of return.

While the country was unsettled, a wilderness, a few years did not give much strength to a title. The war and desolation along the frontiers, on account of Indian depredations, delayed the settlement, and occasioned allowances for not pursuing titles; rules laid down in 1772-3-4, were again adopted, as applicable after the war, in 1785-6-7, and following years. Though it was most palpable, that the reason for indulging a person in not getting a survey returned in 1774 or '5, was no reason at all for indulging him after 1790. The deputy surveyors, before the war, had died, had removed, or were superannuated. Their papers were scattered, some of them displeased at not being in office, and their refusal to return surveys was some excuse. Since the war their bonds could have been sued, or the board of property would have compelled them to have returned surveys.

The doctrine of our courts has not been well understood, for when it is said, a precisely descriptive warrant gives title from its date, a vague one from the time of survey, &c. it is sometimes added, and always understood, *provided it is otherwise followed up with reasonable attention*. It is not, and never was the law, that on taking out a warrant, and procuring a survey, and then neglect-

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ing or refusing to pay the surveyor's fees, which was always necessary to procure a return, that a man could hold the land, without attending to it in any way, for an indefinite length of time.

Although a warrant has been surveyed, yet if not returned, the owner may change its lines, or change its place altogether, and lay it on any other vacant land any where near: until it is returned, the state has no power to collect arrears of purchase money. It never can be that a man can wait thirty or forty years, and all that time be able to say this is my land if I please, and not mine unless I please. I will take this land and pay the state for it, if the country improves, and it rises in value, or if somebody will render it valuable by improvement: but I will not take it and pay the purchase money, unless something occurs to render it more valuable. Nor is it the law, that a man can commence procuring a title from the state, and, from pure negligence, leave it in such situation, for more than twenty years, as that he is not bound to take it, and no one else can safely take it. We have full and ample provision on this subject by our legislature. The act of the 9th of April, 1781, for establishing a land office, provides, in section nine, that all surveys heretofore made shall be returned into the surveyor general's office, within nine months, and prescribes a penalty on any deputy surveyor, *to whom his fees shall be paid*, who neglects to return. This continued till 5th April, 1782, when it was enacted, "It shall be lawful for the surveyor general of this state to receive returns of such surveys, as shall appear to him to have been faithfully and regularly made, from the said late deputy surveyors, their heirs or legal representatives, for such further period, *as to him shall seem just and reasonable*." And a saving for those who had neglected to pay fees and procure returns under the last cited act. The act of 8th April, 1785, section eight, prescribes that every deputy surveyor, shall, as soon as conveniently may be after survey made, *on receiving his fees*, return said survey into the surveyor general's office; and that every survey made before the 31st December, in each year, and not returned before the last of March in next year, shall be void as to future surveys, which shall be returned sooner, and a penalty on the deputy surveyor, if the neglect is by his fault. Although this act has been supposed to be only applicable to lands in the purchase of 1784, and east of the Allegheny river, yet it is important, as shewing the sense of the legislature on the necessity of a return of survey in due time, and the evils incident on neglect in this particular. Then came the act of 4th September, 1793, which provides, that, "All returns of surveys which have been actually executed, since the 4th July, 1776, by deputy surveyors, while they acted under legal appointments, shall be received in the land office, although the said deputy surveyors may happen not to be in office at the time of the return or returns being made: provided *that no returns be admitted, that were made by deputy surveyors, who have been more*

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*than nine years out of office.*" This short law is in some respects obscure when closely examined, but it further shews strongly the sense of the legislature on the subject of keeping titles in this uncertain and unfinished state. It lays down a rule which is not easily to be gotten over by the courts. Independent of this law, who will say that the act of 1782, which allows returns to be received till such period as the surveyor general shall deem just and reasonable, would keep the office open forever.

I am aware that there are cases where plaintiffs have recovered on surveys not returned until since 1793. They will, however, be found very special cases, where the owner has proved great exertions on his part to procure returns, and fraud or accident in preventing them. I am also aware that the owners of many tracts, who have taken possession and occupied them, sold them to others who occupied them, or transmitted them to their descendants, have found no returns in the office. In such cases the land officers issue orders and have returns made yet, and rightly, for no injury is done to any one. So if land has been surveyed, and no adverse claimant, as improver, or by warrant, has any claim to the land, returns are received, and may be received, from the present deputy surveyors; but where, as in the present case, a vague or removed warrant has been surveyed, and then neglected thirty years, or even a less time, and no excuse shown, it was not within a "just and reasonable time" to receive the return, after another had bought and paid for it, as derelict. In another point of view, the title of the plaintiff below was irregular. He and *Long* applied to the board of property, who instead of accepting his draft, made out and signed by *William Lyon* for *John Armstrong*, ordered a re-survey by the deputy surveyor of the county, who was not to make a return to the surveyor general, but to that board, noting the interference, if any, with other claims. After this, the draft made out by *William Lyon* for *John Armstrong*, was carried to the office of the surveyor general, and by him accepted and filed, as a return of survey. It was entirely irregular in him so to receive and file this return. The matter was not before him, it was sub-judice; a very proper order had been made, and it is certain the board thought it not of course to accept a return of this survey. That whether it could be accepted, depended on facts to be ascertained, and the surveyor general had no right to take the matter out of their hands. In *Harris's Lessee v. Monks, 2 Serg. & Rawle, 557*, it was decided that an act of the surveyor general, respecting a return of survey in a case before the board of property, and respecting which they had made an order, was totally void. It is true that was a case in which a caveat had been entered, but the principle, that after a matter was before the board, and after they had taken order on it, it was illegal in the surveyor general to do any act inconsistent with, or superseding their order, is correct, and applies to this case.

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*William Lyon* had no right to return a survey, even while *John Armstrong* was in office. I have no hesitation in saying that he did not make the paper in question for the purpose of being carried to the land office as a return, but for the private use of the owner. There have been cases, where a return by an assistant or deputy surveyor, has been received and filed in the surveyor general's office, as a return. I will not say such return so filed is void, but it was always an irregularity, and is particularly objectionable here, independent of other reasons.

The act of 1793, last cited, does, it is true, mention surveys made since 1776, and this was made long before. I would not infer from this, that surveys made before, might still be accepted. I rather suppose such surveys were considered as out of all reasonable time, and that it alluded to surveys under the act of 1785.

The patent does not alter the case. In this state the inquiry in an ejectment is not who has the patent, but who ought to have it. On the whole, we are of opinion, that under the acts of assembly, under the principles on which all acts of limitations are made, the return of survey ought not to have been accepted, so far as it interfered with the survey of the defendant. That although a survey before the war may yet be accepted, where possession has accompanied it, or perhaps where there is no adverse claim to the land; yet the peace and quiet of the community require, that where any owner of a vague, removed, or perhaps in some cases, a precise warrant, has suffered it to remain unreturned for more than twenty-one years; has kept it in his power to return it as laid, or change it, to pay residue of purchase money, or not to pay it; has exercised no act of ownership; has not claimed it, or returned it for taxation; the state and the citizens had a right to consider it as derelict, and whoever, under such circumstances, purchased and paid for it, has a good title. There must be an end to these half titles sometime. It cannot be at the option of an individual, for half a century, whether he will take a tract of land, or not take it; at all events, his option is at an end, when another person acquires a right to it.

Judgment reversed, and a *venire facias de novo* awarded.

1 PW 82  
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JAMES M. RUSSELL, Esquire, *against* the COMMONWEALTH.

IN ERROR.

A writ of error will not lie to the opinion of the Court of Common Pleas, discharging a person, on a writ of *habeas corpus*, from servitude.

THIS was a writ of error to Bedford county, to remove the record and proceedings upon a *habeas corpus* which issued to *James M. Russell*, Esquire, for the body of *Charity Brogden*.

*Charity Brogden*, the negro woman who claims her freedom, was a slave for life in Maryland, and was there sold at public sale, by the sheriff, on an execution against her master. *Mr. Russell*, the respondent, who was the surety of the master for the debt for which the said slave was sold, became a bidder, and purchased the slave in due form, according to the laws of Maryland.

A deed of manumission was executed by *Mr. Russell* to *Charity*, on consideration of her serving him for a certain term of years. An indenture was then executed and acknowledged before the proper officer in Maryland, dated 16th October, 1821, between *Mr. Russell* and *Charity*, by which she voluntarily binds herself to serve said *Russell*, his heirs, &c. in the state of Pennsylvania, for the term of ten years, from 15th October, 1821. *Mr. Russell* covenants to find her sufficient meat, drink, clothing, washing and lodging, &c. and one dollar when free, &c. Previous to the dispute, *Mr. Russell* remitted on the indenture the three last years of servitude. At the time the deed and indenture were executed, *Charity* was forty years of age, and at the time the writ of *habeas corpus* issued in this case, she was forty-five years of age.

Upon the single fact of the age of *Charity* being forty-five years when the writ issued, the court of common pleas, (*Tod*, president,) discharged the applicant, at the same time saying that they did not know what the opinion of the court would have been, if *Charity* had been but thirty years of age, or any period less than forty-five years.

But their opinion is formed upon the facts as they are, and that to hold *Charity* under the circumstances, would be contrary to the spirit of the laws of Pennsylvania, for the gradual abolition of slavery.

In this court, two points are made.

1st. Will a writ of error lie to remove the judgment of the court of common pleas, rendered upon a *habeas corpus*.

2d. Was the court right in their opinion by which they discharged *Charity* from servitude.

*McCulloch* and *Russell* for the plaintiff in error.

No appearance for defendant in error.

(James M. Russel, Esq. v. the Commonwealth.)

The cause was submitted without argument; and the writ was quashed, on the ground that no writ of error will lie to remove a judgment upon a *habeas corpus*.

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HEGE and others, *against* HEGE and others.

IN ERROR.

A. leaving several children, devised to his son B. a tract of land, he paying fifty dollars an acre therefor; to his son C. a tract of land, he paying sixty dollars per acre therefor; the amount of money so payable to be equally distributed among all his children. B. took under his father's will, made several payments according to its direction, and died leaving children: his administrators having obtained from the Orphans' Court an order to sell his real estate, for the payment of debts, sold the same subject to the payment of the balance of the money due under his father's will. Held that the administrators sold, and purchaser took nothing but the land, and was not entitled to the interest which B. had in the land of his brother C. under his father's will.

When C. came of age, he refused to take the land devised to him, and an agreement was entered into between the guardian of B.'s children, and all the other children of A., that the land devised to C. should be sold, and the money equally divided between them: the land, in pursuance thereof having been sold by trustees appointed for the purpose, and the money in their hands, it was held that a suit would not lie against them in the names of the children of B., to recover their share, but must be brought in the name's of B.'s administrators, there being debts of B.'s estate yet unpaid.

WRIT of error to the court of common pleas of Franklin county, in an action for money had and received, brought by the plaintiffs in error, *Polly Hege, Susan Hege, and Nancy Hege*, by their guardian, *Jacob Zent*, against *Peter Hege, Jacob Hege and Philip Trill*, the defendants in error.

The record exhibited the following facts:—*Christian Hege*, the grandfather of the plaintiffs, and father of two of the defendants, was in his life time seized of two tracts of land, and died, having first made his last will and testament, the material part of which to this cause is as follows:

"To my son *Henry*, I give and bequeath two hundred acres of land lying and situate on the north side of my mansion house and property, the beginning to be on my east line, and run a westerly course, so as to be equally advantageous to both tracts, at present undivided; this division, I will *Jacob Hege*, one of my sons and two discreet neighbours, to be chosen by *Jacob Hege* and *Henry Hege*, to determine. This two hundred acres I value to *Henry Hege*, at fifty dollars per acre, payable in instalments of three hundred dollars in each year, for five years; after five years I will that he pay the



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sum of four hundred dollars yearly, until the whole be discharged: if *Henry Hege* refuses to comply with these terms, it is my will that my executors sell and convey the same land to the highest bidder, at a fair and public sale; if he complies, I will the above described land to him, his heirs and assigns, forever. I will and bequeath to my son, *Peter Hege*, two hundred and thirty-six acres, and fifty-eight perches of land, and allowance, including my mansion house, barn, buildings and appurtenances thereto belonging. This land lies situate on the south side of my property, which I value to him at sixty dollars per acre, payable in instalments of five hundred dollars each year for five years; then the instalments shall be six hundred each year until the amount is paid. My will is that *Jacob Hege* act as guardian for *Peter Hege*, until he is twenty-one, and grant the privilege of selling fifty or sixty acres of the above described land, to be sold and conveyed by my executors. *Jacob Hege* shall choose out the part to be sold, where it will least injure the place. The above described mansion tract I will to *Peter Hege*, his heirs and assigns, forever, the amount being discharged." "I have made the foregoing valuation of my land, in order to leave my property as near equal as possible among my children." "Finally, I will that each of my children shall receive an equal share of my whole estate, of every description, except my smith tools, which I will to *Henry* and *Peter Hege*."

The testator appointed *Jacob Hege*, *Samuel Zent* and *Peter Hege* to be his executors, of whom *Jacob Hege* alone was the surviving and acting executor, when this suit was brought.

This will was proved 20th May, 1815. *Henry Hege*, the devisee, took possession of the land devised to him, and made four of the payments directed by his father's will; and on the 16th July, 1820, died intestate, leaving three children, who are the plaintiffs in this suit.

*Henry Hege's* administrator petitioned the orphans' court for an order to sell the land of his intestate, for the payment of debts, which was granted; and the administrator sold and conveyed the same land which had been devised to *Henry Hege* by his father, to *Samuel Diehl*, on the 12th June, 1821.

On the 9th March, 1824, *Henry Hege's* administrators settled their account in the orphans' court, and there was found a balance in their favour of one hundred and twenty-three dollars and seventy-five cents, after which, and before the bringing of this suit, they were discharged from their office of administrators by the court. When *Peter Hege* came of age, he did not elect to take the devise to him under *Christian Hege*, his father's will: but on the 21st December, 1822, the following agreement was made and executed by and between all the heirs and legatees of *Christian Hege* and the children of *Henry Hege*, deceased, who are the plaintiffs in this suit by their guardian.

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"Whereas *Christian Hege* of the county of Franklin, and state of Pennsylvania, by his last will and testament, did devise and bequeath unto his son *Peter*, his mansion tract of land at a certain valuation, and did distribute the money arising from the sale amongst his children. Now be it known, that it is mutually agreed by and between said *Peter Hege* of the one part, and his brothers and sisters, legatees as aforesaid, of the other part, that his said lands so devised to said *Peter*, should be sold for the best price that can be obtained for the same, and the money arising from said sale, shall be equally divided amongst the children of said *Christian Hege*, deceased, or their representatives, so that the said *Peter*, out of the whole real and personal estate of the said *Christian Hege* shall receive an equal share with his brothers and sisters and no more. And it is further agreed, that said *Peter Hege*, *Jacob Hege* and *Philip Tritt*, for themselves and the other legatees, do contract for the sale of the said tract of land to the purchaser, the said legatees getting their shares of the purchase money, in satisfaction of what they would annually have been entitled to, from *Peter*, under the said will, and will execute the necessary receipts and releases for the same to the said purchaser. And whereas said *Peter* has been charged by his guardian, *Jacob Hege*, and his agent in collecting rents, making sale of part of the land, and making calculation and settlement, three hundred and five dollars, it is considered as reasonable that said *Peter* is not to be charged with the whole of said sum, but he is to be exclusively charged with one third thereof, and the other two thirds shall be taken off all the legatees, equally, in making the distribution."

In pursuance of this agreement, in April, 1824, *Peter Hege*, *Jacob Hege* and *Philip Tritt*, sold the land mentioned, and received the purchase money, which it was agreed should be considered in their hands, for the purpose of trying the several questions which arose out of the facts.

In this court two questions were presented for argument and decision.

1st. Is not *Samuel Diehl*, who purchased the land of *Henry Hege*, deceased, from his administrators, entitled to all the interest which *Henry Hege* had under the will of *Christian Hege*, deceased, and consequently to the money payable out of the land of *Peter* to *Henry*?

2d. Can this action be maintained in the names of the heirs of *Henry Hege*? Should it not have been brought by the administrators?

*Dunlop*, for the plaintiffs in error.

First. The only interest which *Henry Hege* had under the will of his father, which affected the land devised to *Peter*, was a legacy charged upon it; there was no application to the orphans' court by the administrators of *Henry* to sell this interest; that court granted an order for the sale of two hundred acres of land described

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by metes and bounds, which could not embrace a legacy falling due in successive years, and payable out of another tract of land; nor would that court have power to grant such an order.

Second, The yearly payments to be made by *Peter* out of the land devised to him, were in the nature of an annuity, and go to the heir, and not to the administrator. 1 *Rop. on Leg.* 153. 2 *Vernon Rep.* 133. *Toll Law of Exec'rs.* 178. And although an annuity is generally chargeable upon the person of the grantor, yet it may be chargeable upon a real or personal fund. 1 *Com. Dig.* 622. *tit. Annuity.* 1 *Jac. Law Dic. tit. Annuity, Doc. & Stu.* 90. 10 *Mod. Rep.* 237. 2 *Ves. Sr.* 17. 1 *Brown's Chan.* 377. 1 *Rop. on Leg.* 153.

If a devisee refuses to take land charged with legacies, it descends to the heir subject to the payment of those legacies; and therefore, *Henry*, the father of the plaintiffs, being an heir, upon the refusal of *Peter* to take, the fee and the charge being both vested in him, the charge would be merged in the inheritance. 8 *Com. Dig.* 311, *tit. Merger.* If lands are devised to A. and he cannot be found, they descend to the heir: so if land be devised to the executors to sell, before they qualify themselves to sell, the land goes to the heir. *Henderson v. Wilson*, 13 *Sergt. & Rawle*, 330.

The application of these legal principles to the facts of this case lead inevitably to the conclusion, that the claim which the children of *Henry* had upon the land of *Peter*, was a real interest, which descended to them, and for which they alone could sue.

In another point of view. A proper construction of the agreement of the 21st of December, 1822, amounts to this, that the legatees agree not to take their legacies, and the devisee not to take the devise; whereby the will of *Christian Hege* was rendered inoperative as to this land, it therefore descended as realty to *Henry Hege's* children, and therefore they alone could sue for the money arising out of the sale of that inheritance, which was made as to their interest, by their agreement and authority.

There was a valuable consideration which induced *Peter Hege* to enter into this agreement: for upon his refusal to take the real estate devised to him, subject to the legacies, he would take nothing. 2 *Rop. on Leg.* 447-450. And if he took the land, he would have been personally liable for the legacies, which amounted to more than its value. *Gleim v. Fisher*, 6 *Johns. Chan. Rep.* 33.

If then *Peter Hege*, under the influence of this consideration, and the other defendants, thus agreed with the plaintiffs and the other heirs of *Christian Hege*, that this part of the estate should be considered as *land*, and should be sold as their *inheritance*, they ought not now to be permitted to sustain a defence against the legal operation of their agreement.

*Cramford* appears for *Samuel Diehl*, the purchaser of *Henry Hege's* estate from the administrators.

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The defendants are mere stakeholders, having no interest in this cause.

The administrators of *Henry Hege* applied to the orphans' court for an order to sell the estate devised to *Henry* by his father's will, subject to the payment of the legacies; and the conditions of sale made known by the administrators, stated that they would sell all the interest of *Henry Hege*, deceased, under his father's will, "which is herewith exhibited." The interest which *Henry* had in *Peter's* land, being part of the estate which he took under his father's will, passed by the sale made by *Henry's* administrators to *Samuel Diehl*; there was therefore nothing left in *Henry's* heirs to sue for.

It is *Samuel Diehl* who defends in this suit against the operation of an agreement, in the subject matter of which, he had an interest at the time of its execution, and to which he is not a party, and cannot therefore be affected by it.

But the plaintiffs in this suit cannot recover at all; if there can be a recovery by any one but *Samuel Diehl*, it must be by the administrators of *Henry Hege*.

By the will of *Christian Hege*, deceased, his ten children were to share his real and personal estate equally, and executors of that will were appointed, through whose hands the estate must come to be distributed, and therefore, in the shape of personal estate and not land.

The balance overpaid by the administrators of *Henry Hege*, as appeared upon the settlement of their administration account, remained a debt against the estate, and being indebted, no one but his administrators could sustain an action to recover a legacy due to him.

*Chambers*, for the defendants in error.

This cause depends upon the construction of the will of *Christian Hege*, deceased.

The interest of *Henry*, under his father's will, was land. *Henry* could not have sued *Peter*, nor could *Peter* have sued *Henry* for their respective legacies. The land was devised in consideration of fifty dollars an acre to one, and sixty dollars an acre to the other; and which was not payable by *Peter* to his brothers and sisters, nor by *Henry* to his brothers and sisters, but which was payable by *Henry* and *Peter* respectively to the executors of their father, *Christian Hege*, and therefore if *Henry* was alive, he could sustain no action against *Peter*, and therefore his administrators, much less his heirs, cannot sustain it.

If the will of *Christian Hege* had been executed, *Peter* would have to pay six hundred, and *Henry* four hundred dollars per annum, to the executors, and this was to be equally distributed between the ten children; out of which *Henry's* share would be one hundred dollars per annum, leaving him a debtor to the estate to the amount of three hundred dollars per annum: and being thus indebted to

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the estate, he could not sustain an action to recover from it. *Henry*, having taken the lands devised to him by his father's will, became personally liable for the payment of the legacies; and being thus a debtor to the fund ten dollars for every one he was to receive, neither he, his heirs nor administrators, can recover.

*Peter Hege* had no election to make, either to take or not take the land devised to him, and take his share of the estate, as was the case with *Henry*; and the only effect which the agreement of the 21st December, 1822, had upon the situation of the parties, was to give to *Peter* a share in the estate, upon his refusal to take the devise, which without the agreement he would not have been entitled to.

*Dunlop*, in reply.—*Samuel Diehl* being no party to this suit, cannot be affected by it in any way. It is not the true construction of *Christian Hege's* will, that the whole estate was a general fund for the payment of the legacies; on the contrary, it is the manifest intention of the testator that the legacies should be paid by *Henry* and *Peter* directly to the legatees, and not to the executors.

Because of *Peter* being liable to pay to *Henry* a certain legacy, and *Henry* being liable to pay to *Peter* a certain legacy, both of which being charged upon their respective devises, the law does not make an extinguishment of the one to the amount of the other: if it did, the rule must necessarily be general, and take effect immediately upon the death of the testator; and the law would be the same although the one or the other may have assigned his legacy, or the fund out of which it was payable, may have been assigned. Or suppose the land of one or the other should be sold for the debts of the testator? The consideration of these supposed cases, suggests difficulties which are unanswerable, and lead to the conclusion that the law is not on this point as contended for by the defendants.

The opinion of the court was delivered by

HUSTON, J.—This was a case stated, for the opinion of the common pleas, on the will of *Christian Hege*, deceased, and the facts which have occurred since his death.

*Christian Hege*, by his last will, after directing his debts to be paid, and making provision for his wife, devised as follows: "To my son *Henry* I give and bequeath two hundred acres of land, lying and situate on the north side of my mansion house and property, the beginning to be on my east line and run a westerly course, so as to be equally advantageous to both tracts, at present undivided. This division I wish *Jacob Hege*, and two discreet neighbours to be chosen by *Jacob Hege* and *Henry Hege*, to determine. This two hundred acres I value to *Henry Hege* at fifty dollars per acre, payable in instalments of three hundred dollars each for five years; after five years, I will that he pay the sum of four hundred dollars yearly, until the whole sum be discharged. If *Henry Hege* refuses to com-

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ply with these terms, it is my will that my executors sell the same land to the highest bidder, at fair and public sale; if he complies, I will the above described land to him and his heirs and assigns forever.

"I will and bequeath to my son, *Peter Hege*, two hundred and thirty-six acres fifty-eight perches of land and allowance, including my mansion-house, barn, buildings and appurtenances thereto belonging. This land lies at the south side of my property, which I value to him at sixty dollars per acre, payable in instalments of five hundred dollars per year, for five years; then the instalments shall be six hundred dollars per year until the amount is paid. My will is that *Jacob Hege* act as guardian of *Peter Hege* until he is twenty-one, and grant the privilege of selling off fifty or sixty acres of the above land, to be sold and conveyed by my executors. *Jacob Hege* shall choose out the part to be sold where it will least injure the property. The above mentioned property I will and devise to *Peter Hege*, his heirs and assigns forever, the amount being discharged."

He then proceeded to order a sale of his personal property, and of a tract of land in M'Connel's cave, &c. "Finally, I will that each of my children receive an equal share of my whole estate," &c. and appointed three executors. The will was proved 20th May, 1815.

*Henry Hege* took possession of the part devised to him, and made four payments, and died 16th July, 1820, leaving three children, the plaintiffs in this cause. After his death, the land devised to him was sold by order of the orphans' court for the payment of debts. The petition, order and deed, describe it particularly, as two hundred acres by metes and bounds, being the same devised to him by his father, and it was asked to be sold, and was sold expressly subject to the payment of the remaining sums, to which it was subjected by the will of his father. *Samuel Diehl* was the purchaser. The guardian and executors sold fifty acres of the part devised to *Peter*. After *Peter* came of age, he determined not to take the land devised to him; and his brothers and sisters, and the guardian of *Henry's* children entered into an agreement on the 20th of December, 1822, in which, after reciting the devise to him, it was "mutually agreed between *Peter* and his brothers and sisters, legatees as aforesaid, that the said land so devised to *Peter Hege*, should be sold for the best price that could be obtained for the same, and the money arising from the sale should be equally divided among the children of the said *Christian Hege*, or their representatives, so that the said *Peter Hege*, out of the whole real estate of said *Christian Hege*, shall receive an equal share with his brothers and sisters, and no more:" and then persons are appointed to sell, and the legatees covenant to release to the purchaser.

The land was sold, and the price was, for the purposes of this

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decision, admitted to be in the hands of those who sold, who are defendants.

On the 9th of March, 1824, the administrators of *Henry* settled their account, and there was a balance in their favour of one hundred and twenty-four dollars, paid in discharge of debts beyond the amount of the personal estate and of the lands sold, and were discharged by the orphans' court, before this suit brought. *Jacob Hege*, one of the defendants, is the surviving executor of *Christian Hege*, deceased.

*Samuel Diehl*, who purchased the land devised to *Henry*, claimed to be entitled to *Henry's* share of the land devised to *Peter*, subject to the payment of six hundred dollars per year, which was to be divided among the legatees, of whom *Henry* was one, in equal portions; and contended that all the interest in lands devised to *Henry* by the will of his father, was sold and purchased by him, *Diehl*. On inspecting the sale on the records of the orphans' court, it is not so. There is no room for dispute: it is the two hundred acres devised to *Henry*, by the will of his father, which is sold. It has been contested whether *Henry's* interest in the land devised to *Peter*, was land or personal estate, in the event of *Peter* refusing to keep it, but it is entirely unnecessary to decide that; for whether it was one or the other, it was not embraced in the application for sale, in the order of the court, nor in the deed. *Henry* was dead, and his land sold, and deed made, in June 1821. *Peter* did not refuse to take till 1822. It would be strange if the orphans' court had ordered a debt amounting to one thousand dollars, and falling due in successive years, in instalments of sixty dollars per year, to be sold at auction. It would be still more strange if a claim of this kind, charged on *Peter's* land, should be transferred by a sale of *Henry's* interest in another and different tract; and that without its being once alluded to in the evidence of that sale. *Diehl* represents *Henry* entirely, as to his interest in the two hundred acres devised to him, because he purchased and paid for that interest, but he does not represent *Henry* as to any thing else devised to him by that will, for the same reason, to wit: that he has not bought or paid for any interest in any part of what was devised to *Henry*, except the two hundred acres of land.

Another point was made, and much discussed, whether this suit could be maintained by the children of *Henry*, or must be brought by his administrators, there being debts yet unpaid; for the administrators of *Henry*, having paid debts of his beyond the assets which came to their hands, stand in the place of the creditors to whom they paid. The debts are the debts of the deceased, as much as if they yet belonged to the original creditor.

In England, lands of a deceased are not charged with the debts, unless of a particular description; here, all lands left by a deceased are liable for every debt of a deceased; there, lands descend gene-

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rally to one heir; here, they go to several, if several stand in the same relation to the intestate. There, lands go in one direction, and personal estate is distributed differently. Here, in almost every case, the lands and personal estate go to the same persons, and in the same proportions: all the cases cited in this cause to shew what in England goes to the heir, and what to the executor, are inapplicable to this case. Where debts are unpaid in this country, they are levied equally from lands or goods, stated to be, and actually for this purpose being, in point of law, in the hands of the administrators. Where the lands themselves are to be recovered, the suit is by the heirs. Where debts are to be recovered, or personal property, or damages for breach of contract with the deceased, the administrator must bring the suit. I shall, on this subject, only refer to the case of *Lee v. Wright*, in 1 *Rawle*, 149, decided by this court in December term last, in which every thing contended for in this case was considered.

The decision of the court was right on both points, and judgment is affirmed.

GIBSON, C. J.—As I concur on every point but that which regards the right of the plaintiffs to maintain the action in their own names, it is unnecessary to state more of the case than relates to the question. It is thus. A father devises a plantation to each of his sons, *Henry* and *Peter*, on terms of paying a specified price, to be distributed among all his children; and directs his executors to sell the plantation of *Henry* if he should refuse to accept on the terms prescribed, but gives no such direction with respect to the plantation of *Peter*. *Henry* accepts, pays part of the price, and, while *Peter* is a minor, dies, leaving the plaintiffs his children. The guardian of *Peter* enters on the plantation devised to him, and pays part of the price; but *Peter* himself on coming of age, agrees with his brothers, sisters, and the plaintiffs, by writing under seal, to have it sold, "the said legatees," as it is expressed, "getting their share of the purchase money, in satisfaction of what they would have got from *Peter*, under the will." The land is in fact so sold, the price received by the defendants, and the plaintiffs having sued for their share of it, are met by an objection that the action ought to be in the name of their father's administrator.

It does not appear whether *Peter*, on coming of age, accepted or rejected the devise. That he was concluded by the election of his guardian will not be pretended. The doctrine is accurately stated in *Brown v. Caldwell*, (10 *Serg. & Rawle*, 114,) where it was held that the act of a guardian, in agreeing to what in this state is popularly called a consentable line, may be avoided by the ward immediately on his coming of age. Either, then, he accepted, or he did not. If he accepted, the estate became absolute in him, and he became, personally indebted for the price of it to his father's executors, to whom alone recourse could be had by *Henry*, or, so far as might be



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necessary for the payment of his debts, by his administrator. If *Peter* became indebted to the executors, the money was demandable by them, for payment of his father's debts, and distributable to the administrator of *Henry*, by them alone. But without an interest in the land, neither *Henry* nor his administrator could make pretence to an action for the proceeds of it. The utmost that the administrator could insist on, would be that no agreement of the plaintiffs with the other legatees should prevent him from recovering from the executors as much of *Henry's* share of the money owing by *Peter* as would enable him to pay *Henry's* debts; but for all beyond, the defendants would be liable to the plaintiffs by force of their agreement. If then the land vested in *Peter*, the administrator would not have a colour of title to demand any part of the price of it from the defendants.

But what if *Henry*, as he may have done, rejected the devise? The land, in that aspect of the case, fell back into the estate of his father, who died intestate in respect of it, just as if it had not been devised; consequently it descended in the first place to *Henry*, and the other children as tenants in common, and afterwards as regards his estate in it, to the plaintiffs. The interest of *Henry* while he lived, and of the plaintiffs after his death, was *real estate*; and it was *THEIR* land which was sold by virtue of the agreement. Neither *Henry* nor any one who represents him could claim an interest in the price of it under the will, for neither the land nor the price of it, passed by the will. We have then the naked case of a debt owing, not to the intestate's father, from whom the land descended, but to his children; and from agents who have received the price of their land, in pursuance of an agreement to pay it over to them, notwithstanding which, it is said, the money can be reached only through the administrator of their father, because it may possibly be needed to pay his debts.

When the children of an intestate have sold that which descended from him, I believe it has never been understood that either the administrator or the creditors can interpose a claim to the purchase money. The purchaser stands in the place of the children; and the remedy of the creditors is by judgment against the administrator, and execution of the land as a fund into whose hands soever it may have come; or where the administrator interferes by a sale of it under an order of the orphans' court. In the case of a judicial sale, policy requires that a purchaser have a clear title; but the principle has never before been applied to a private sale, which not being under the supervision of a superior power to make a proper application of the purchase money, would in every instance jeopard the security of lien creditors. In fact, a lien would be entirely worthless, if the land were discharged by the sale, and the lien shifted so as to attach it to the purchase money. The present is the case of a private sale, and as well might the widow of *Henry* claim a share

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of the purchase money, although her interest is expressly charged on the land with a right to distrain. If then, by force of the intestate laws, the debts be charged on the land as a fund, it would be manifestly unjust to have them paid, in ease of the purchaser, out of the price coming to the children, who sold no more than their interest, and consequently only what might remain after the debts should be paid. On what ground then, could the administrator interpose? That he can have an action in a representative capacity, only for a debt which was owing to the decedent himself, is a common-place principle, for which it would look like affectation to cite an authority; and as the money, when recovered, would not be assets, I can perceive no good reason why he should maintain the action.

Judgment affirmed.

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JOHN COBEAN, plaintiff in error against THOMAS THOMPSON.

“Yeoman” is a sufficient designation of the occupation of the owner of a slave, under the act of 1780.

ERROR to Adams county.

The only question in this case is, whether “Yeoman” is such a designation of the occupation of a master, as is required by the act of Assembly for the gradual abolition of slavery, to be returned to the clerk of the quarter sessions.

*Stevens*, for plaintiff in error—Contends that in this country the name *yeoman* and *farmer* are synonymous terms, and if *farmer* is a sufficient designation under the act, *yeoman* is.—*Walker's Dictionary*, word “Yeoman.”

*Miller*, for defendant in error.—The fifth section of the act of 1780, *Purd. Dig.* requires the occupation of the owner to be set out on the record, and *yeoman*, in this country, is not such a designation as will distinguish a farmer from any other employment or occupation. *Commonwealth v. Barker*, 11 *Serg. & Rawle*, 380. In this case it was proved that the master was a farmer, and it would have been easy to have designated him as such. *Wilson v. Bellinda*, 3 *Serg. & Rawle*, 401.

BY THE COURT.—The designation is sufficiently certain.

Judgment reversed.

**1 JEREMIAH SNYDER** *against* the COMMONWEALTH, for the use of **CATHARINE STILLINGER.**

**IN ERROR.**

The neglect or refusal of a sheriff to commit a person convicted of fornication, until the sentence should be complied with, according to the decree of the court, makes him liable upon his official bond, to the mother of the child, for the amount which the person convicted was sentenced to pay to her for its maintenance.

THIS was a writ of error to the common pleas of Franklin county, upon the return of which, the record exhibited an action of debt, brought by the defendant in error, *Catharine Stillinger*, against the plaintiff in error, *Jeremiah Snyder*, upon his official bond, given as sheriff of Franklin county—A declaration in debt was filed, and the following breach of the condition of the bond was assigned: "That *Simon Eckert*, on the 18th April, 1820, in the court of quarter sessions of Franklin county, was convicted of fornication and bastardy, and sentenced to pay *Catharine Stillinger*, the mother of the illegitimate child, one dollar per week, until the child should arrive at the age of seven years, to be paid quarterly; to be bound, himself in one thousand dollars, and one good security in one thousand dollars, pay the costs, and stand committed till the sentence was complied with. Yet the said *Jeremiah Snyder*, then being high sheriff of said county, did not commit the said *Simon*, although he did not pay, or give security, as was commanded by the said court."

The facts being undisputed, the court below, (*Thompson*, president,) was of opinion that the plaintiff was entitled to recover; to which opinion exception was taken, and it was the only error assigned in this court, which was argued by *Crawford*, for the plaintiff in error.

The act of 28th March, 1803, section 3, *Purd Dig.* 755, provides the form of the recognizance and bond of a sheriff, and that bond binds the officer alone to the performance of duties in civil cases. Our act of assembly is assimilated to the form of the oath of a sheriff in England; and although there are many cases of indictments against a sheriff there, for breaches of duty in criminal cases, yet no case can be found, where a civil suit was sustained against him for such breach of duty. 6 *Bac. Ab.* 146, tit. *Sheriff.* *Hawk. Pleas of the Crown*, Book 2, Sec. 22. 1 *Hale's Pleas of the Crown*, 597.

A court of quarter sessions has all the power necessary to enforce its own sentence, and therefore, the court of common pleas can have no jurisdiction of this suit. A sheriff is liable upon his bond for fines collected on sentences of the criminal courts, but it was necessary to provide this remedy by the acts of 1803, and 30th March,

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1811. A recognizance taken in the court of quarter sessions, could not have been sued in the common pleas, if it had not been for the act of 1783, authorizing such suit.

*Chambers*, for the defendant in error.

The bond of the defendant below, contains a condition "that he will execute all process to him directed, and faithfully perform all the duties and trusts appertaining to the office of the sheriff." The written decree of the court might be termed its process, directed to the sheriff, and which he was bound to execute, and upon his neglect or refusal so to do, the condition of his bond was broken. The decree that *Simon Eckert* should pay to *Catharine Stillinger*, was a decree of the court, separate and distinct from the judgment. *Duncan v. the Commonwealth*, 4 *Serg. & Rawle*, 449. But it was certainly a duty appertaining to the office of sheriff, to commit *Eckert* until the sentence was complied with, and this he neglected or refused to do; whereby his bond was forfeited.

*Crawford* in reply.—In the case of *Duncan v. the Commonwealth*, it is not decided, that that part of the sentence of the court which directs a certain sum of money to be paid to the mother, for the support of the child, is not part of the judgment: but on the contrary it is there said to be part of the judgment, but a part which may be reversed without reversing the whole.

The opinion of the court was delivered by

ROGERS, J.—The defendant stipulates, that he will well and truly serve and execute all writs and process to him directed; and that he will well and faithfully execute and perform, all and every of the trusts and duties of the office of sheriff. The plaintiff assigns for breach of the sheriff's bond, the sentence of the court of quarter sessions, that *Simon Eckert*, convicted of being the father of an illegitimate child, should pay a sum of money to the plaintiff *Catharine Stillinger*, and give security for a performance of the order, and stand committed until the sentence should be complied with. And the plaintiff avers that the defendant, *Jeremiah Snyder*, being high sheriff of the county of Franklin, did not commit the said *Simon*, although he did not pay or give security, as was commanded.

This was an adjudication, which doubtless the court of quarter sessions was competent to make, and which it is conceded, the sheriff might have been compelled to execute by attachment, or punished by indictment for not executing, and this on the ground, that it was a neglect or refusal, to perform a duty appertaining to his office. But these are not, (as has been contended,) the only remedies, for it is manifest that an attachment or indictment, would, in many cases, leave the plaintiff without relief.

In the order of the court, the money is awarded to the mother, for the support of the child, and security is demanded for a com-

(*Jeremiah Snyder v. the Commonwealth, for the use of Catharine Stillinger.*)

pliance with the sentence, and an indemnification of the county, from the maintenance of the bastard. It therefore, although in form an indictment, partakes of the nature of a civil action.

The neglect or refusal to carry into effect the judgment of the court, is a failure on the part of the sheriff, to execute a process, (in the nature of an execution,) of a court of competent jurisdiction, and is not a faithful performance of his duty, which brings the case within the words and spirit, of the condition of his bond. The court therefore believe that the breach has been well assigned, that the plaintiff has sustained injury from the conduct of the sheriff, and the judgment should be affirmed.

Judgment affirmed.

JOHN M'LANAHAN and MICHAEL M'LANAHAN, surviving Executors of JOHN M'LANAHAN, with notice to JACOB ICKUS, terre-tenant, *against* JOHN WYANT, Administrator of MARTHA M'LANAHAN.

#### IN ERROR.

Judicial sales of land, divest all liens, whether general or specific.

When a legacy is charged upon land, the sheriff's vendee takes the land, discharged from the lien of the legacy. And a purchaser of land, sold by an administrator, by an order of the Orphans' Court, takes the land discharged of the lien of a legacy.

To recover a legacy charged upon land, the most approved form, is to bring the suit against the executors *and* the terre-tenants of the land generally by name.

If the terre-tenants have not all been summoned, the plaintiff may pray a writ to summon the person alleged to be terre-tenant; and by this means he may be made a party in the same manner as if he had been summoned or returned by the sheriff, as terre-tenant of the land.

When a testator, by his will, blends his real and personal estate, he thereby charges his land with the payment of legacies.

THE record of this case, returned on a writ of error to the court of common pleas of Franklin county, showed, that it was an action brought by the defendant in error, who was plaintiff below, against the plaintiffs in error, defendants below, to recover a legacy due to *Martha M' Lanahan*, under the will of her husband, *John M' Lanahan*. The material part of the will is as follows:

"First, I give and bequeath unto my beloved wife *Martha*, the sum of six hundred pounds, specie, Pennsylvania currency—one hundred pounds thereof is to be paid unto her one year after my decease, by my executors, and the residue in gales of twenty-five pounds a year, yearly and every year, until the whole sum of six hundred pounds is fully paid unto her, her heirs or assigns; and

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also is to have a room to herself in the mansion house, and a comfortable living; and also to have one mare and two cows to herself, to be kept and fothered on the plantation for her use, with stable room for the same, during her widowhood. To my sons, *John Thomas*, and *Michael*, I give and bequeath all my real and personal estate, with all the appurtenances thereto belonging, excepting such part as hereafter reserved for the remaining legatees, subjecting my land, nevertheless, to be liable to the several payments hereafter mentioned. To the legatees of said estate the land is to be equally divided in quantity and quality, having due regard to the real value of the same, to be divided by themselves, and in case of disagreement, to choose men for the same, allowing my eldest son, *John*, the mansion house, and that part which will be most suitable for the same, allowing him, likewise, two hundred pounds advantage in said division, on account of his mother's maintenance. To my son *Samuel*, I give and bequeath the sum of one hundred pounds, which he has already received. To my son *Josiah*, I give and bequeath the sum of four hundred pounds, together with what he has already received, to be paid to him in manner following: fifty pounds three years after my decease, and then fifty pounds a year until the whole sum is fully paid. To my daughter *Martha*, I will and bequeath the sum of twenty shillings, and furthermore allow my beloved wife *Martha*, and my son *John*, to pay her one hundred pounds, or to her children, to which either they please. To my daughters, *Jane*, *Rebecca*, *Lethis* and *Elizabeth*, I will and bequeath the sum of two hundred and fifty pounds each, together with good bed and bed clothing to each, deducting from *Jean* the value of what she has already received in stock and furniture, and then to be paid in the following manner, that is to say, to my daughter *Rebecca*, the sum of fifty pounds one year after my decease, and two years after my decease, fifty pounds unto my daughter *Jane*, and so on yearly and alternatively, until the aforesaid legacy is fully paid unto them, their heirs or assigns; and then is to pay fifty pounds to my daughter *Lethis* in one year following; and then fifty pounds the year after unto my daughter *Elizabeth*, and so on alternatively, fifty pounds yearly, until their aforesaid legacies is paid unto them, their heirs and assigns; and to my daughter *Elenor*, I will and bequeath the sum of four hundred pounds, out of which she is to get sufficient schooling, and the remainder to be paid in the following manner, fifty pounds to be paid to her again she will be eighteen years of age, and then fifty pounds yearly until the aforesaid sum is fully paid unto her, and for the purpose aforesaid. I nominate, ordain and appoint my three sons, *John*, *Thomas* and *Michael*, to be my lawful executors

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of this my last will and testament, to pay and recover all just debts, and discharge the legacies within mentioned."

On the 16th of December, 1824, the following declaration was filed.

"John M'Lanahan and Michael M'Lanahan, both of the county aforesaid, yeomen, surviving executors of the last will of John M'Lanahan, of said county, deceased, were attached to answer John Wyant, administrator of the goods and chattels and of Martha M'Lanahan deceased, of a plea of trespass on the case, &c. and whereupon the said John Wyant, by George Chambers and Joseph Chambers, his attorneys complains, That whereas John M'Lanahan in his life time, to wit, the seventh day of July, seventeen hundred and ninety-seven, at the county aforesaid, by his last will and testament in writing, duly executed, did, among other things, bequeath unto his wife, Martha M'Lanahan, the sum of six hundred pounds, to be paid as follows to wit: one hundred pounds to be paid the said Martha, one year after the decease of the said testator, and the remainder thereof in gales of twenty-five pounds per year, yearly, and every year thereafter, until the whole sum of six hundred pounds was fully paid to the said Martha, her heirs and assigns. And that the said testator, by his same will, did further devise and bequeath to his said wife Martha, a room in his mansion house and a comfortable living, and also one mare and two cows to be kept on the plantation of the said testator during the widowhood of the said Martha: and the said testator, John M'Lanahan, did, by his same will, devise to his three sons, John, Thomas and Michael, all his real and personal estate, excepting such portion of his personal estate as was by his will otherwise disposed of; and by his last will and testament, did therein appoint his three sons, John, Thomas and Michael, executors, to pay and receive all just debts, and discharge the legacies mentioned in said will, and the said John Wyant in fact saith, That after the making of said will, to wit, the first day of March, seventeen hundred and ninety-eight, the said John M'Lanahan, deceased, and the aforesaid sons, John, Thomas and Michael M'Lanahan, did duly prove the said will on the day and year last aforesaid, and took upon themselves the burden of the execution thereof, and did then and there possess themselves of all the real and personal estate whereof the said testator died seized and possessed; and the said John Wyant further in fact saith, that the estate of the said testator, to a great amount beyond all debts, and funeral expenses, and legacies mentioned in said will, came into the hands and possession of the said executors, to wit, at the county aforesaid; and the said John Wyant doth further, in fact, say, that the said executors, John, Thomas and Michael did, as devisees of the real estate of the said testator, immediately after the decease of

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the said testator, enter on the lands which were of the said deceased, in the said county of Franklin, and possess and enjoy the same, as devised to them in said last will and testament: and that afterwards, to wit, the third day of May, eighteen hundred and seventeen, Thomas M'Lanahan, one of the said executors and devisees, died, by reason whereof the said John and Michael M'Lanahan became the surviving executors of said testator, and of the said lands and tenements so devised, and of a value more than sufficient to pay all debts and legacies, the said John and Michael M'Lanahan, devisees as aforesaid, were at the impretation of this writ, possessed, together with Jacob Ickus, named in the same writ, as terre-tenant, and which said Ickus doth hold and enjoy the possession of said premises, as the tenant of the heirs and representatives of the said Thomas M'Lanahan, deceased. By reason whereof the said executors and devisees became liable to pay to the said Martha, in her life time, the said sum of six hundred pounds: nevertheless the said John, Thomas and Michael, the said sum of six hundred pounds, or any part thereof, to the said Martha, in her life time, or to the said John Wyant, after the death of said Martha, (who died, to wit, the fifteenth day of June, in the year one thousand eight hundred and nineteen, and to which said John Wyant, after the death of the said Martha, to wit, the twentieth day of September, eighteen hundred and twenty-one, administrator of the goods and chattels, rights and credits which were of the said Martha, was committed by the register of the said county of Franklin, in due form of law,) yet hath not paid, although to do the same, the said John, Thomas and Michael, executors and devisees as aforesaid, by the said Martha in her life time, to wit, the first day of January, one thousand eight hundred and seventeen, and at other days and times before and after said day, and the said John and Michael, surviving executors and devisees since the death of the said Thomas by the said John Wyant since the death of the said Martha, were requested; but the said legacy to the said Martha in her life time, and to the said John Wyant, since the death of the said Martha the said John M'Lanahan, and Michael M'Lanahan to pay have refused, and the same to pay to the said John Wyant, the said John and Michael M'Lanahan, surviving executors and devisees as aforesaid, still do refuse, to the damage of the said John Wyant one thousand pounds, &c. &c."

28th March, 1826, defendants, *John and Michael*, pleaded in abatement as follows:

"And now the said *John and Michael* by *James Dunlop*, their attorney, come and defend the force and injury when, &c. and say, that the said plaintiffs ought not to have and maintain his aforesaid action thereof against the said *John and Michael*, because they are



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not chargeable as executors of the said *John M'Lanahan*, deceased, with the payment of the said legacy of two hundred and fifty pounds, but that the lands and tenements of the said *John M'Lanahan*, deceased were, by the last will and testament of said *John*, subjected to the payment of the said two hundred and fifty pounds, and so charged and encumbered were by the said last will and testament devised to the said *John* and *Michael*, and *Thomas*, another son of the said *John*, deceased.

"And the said defendants further say, that the said *Thomas* so being jointly seized with the said *John* and *Michael*, afterwards, to wit, January term, one thousand eight hundred and nine, out of the court of common pleas in and for said county of Franklin, sued and prosecuted a writ of partition against the said *John* and *Michael*, and that after the return thereof, viz, on the fifth day of March, one thousand eight hundred and eleven, the said *Thomas*, *John* and *Michael*, parties thereto by consent, submitted the matters thereof to certain referees, mutually chosen, who divided the said lands so devised to and amongst the said *John*, *Michael* and *Thomas*, and made report to the said court to January term, one thousand eight hundred and eleven, agreeably to the said submission, which said report was then confirmed by the said court, and fully acquiesced in by the said parties continually thereafter.

"And the said *John* and *Michael* further say that afterwards, and in pursuance thereof, the said *John*, *Michael* and *Thomas* took possession of their several purparts so laid off and divided, and became severally seized of their separate and distinct purparts, according to the said report and judgment of said court, each one in his own demesne as of fee and being so seized of their distinct and separate purparts; the said *Thomas* afterwards, viz, on the . . . day of April, one thousand eight hundred and eleven, died, leaving three children, viz, Alexander, Amelia and Catharine, who, at the time of the impetration of the writ in this cause, were and still are, in full life and residing within the jurisdiction of this court.

"And the said *John* and *Michael* further say, that *John Flanagan*, Esq. who was duly appointed administrator of all and singular, the goods and chattels, rights and credits which were of the said *Thomas*, by the register of the said county of Franklin, afterwards, to wit, on the twenty-first day of May, one thousand eight hundred and eighteen, sold and conveyed of the said purpart of said *Thomas*, in pursuance of a decree of the orphans' court of said county, nine acres and three perches to *John M'Gee*; twenty-one acres and eighty-seven perches, to *Richard Hayden*; thirty-five acres and ninety-eight perches to Doctor *John Oelig*; fourteen acres one hundred and thirty-two perches to *James Gettys*, and that two hundred acres of the said purpart of the said *Thomas*, was purchased at

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sheriff's sale, from *Archibald Flemming*, Esq. high sheriff of said county, by *Samuel Hughes*, Esq. which said two hundred acres were sold by the said sheriff, under a *fiery facias* and *venditioni exponas*, issued out of said court of common pleas of said county, of which said two hundred acres the said *Samuel* is now seized in his demesne as of fee, all which several tracts or parcels thus sold and conveyed, were parts of the said purpart of which the said *Thomas* so died seized. And the said *John* and *Michael* further say, that the said *John Oelig*, after the said sale so made to him by the said administrator, sold and conveyed, by deed, the said thirty-five acres to *James Burns*, and *Isaac Moorehead*, as an insolvent debtor, under the laws of this commonwealth, in trust, for the use of his creditors; and that the said *John M'Gee*, after the 21st day of March, 1818, died, leaving *Barnard M'Gee*, his brother, his sole heir at law, all which said several persons, viz: *Barnard M'Gee*, *Richard Hayden*, *James Burns*, *Isaac Moorehead*, *Martin Funk*, *Samuel Hughes*, and *James Gettys*, at the impetration of the said writ issued in this cause, were and still are tenants of the said several purparts, according to their said respective titles, of which the said *Thomas M'Lanahan* died seized as aforesaid, and that the said *Catharine*, *Alexander* and *Amelia*, since the death of their father, the said *Thomas*, continually have been, and still are, in full life and seized in their demesnes as of fee in the remaining part of said purpart, of which the said *Thomas* died seized, and that no writ hath issued against either of the said tenants or children, and heirs of said *Thomas*, nor against the said *James Burns*, *Isaac Moorehead*, *Richard Hayden*, *Martin Funk*, *Samuel Hughes*, and *James Gettys*, or either of them, and this they, the said *John* and *Michael*, are ready to verify, and, therefore, inasmuch as no writ hath issued out of the common pleas of said county, against them, the said *Catharine*, *Alexander* and *Amelia*, and against *James Burns*, *Isaac Moorehead*, *Barnard M'Gee*, *Richard Hayden*, *Martin Funk* and *James Gettys*, to the said sheriff of the county directed, they, the said *John* and *Michael*, pray judgment, if they ought to be compelled to answer the said writ returned."

The plaintiff demurred to this plea, and after argument the court of common pleas made the following order.

"The court do adjudge that the defendants ought not now to be compelled to answer, and order that notice of this action be given to the several terre-tenants named by defendants (in their plea of abatement) returnable at next term, and that the person so named after service be added as terre-tenants. And the defendants now of record agree not to take any advantage of the mode of bringing in the other terre-tenants. The death of *Isaac Moorehead* and *Richard Hayden*, terre-tenants (in plea) suggested; *exit* notice to

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terre-tenants. 28th July, 1826, served personally upon *James Burns, Martin Funk, Samuel Hughes, Catharine M'Lanahan, Amelia M'Lanahan, and Alexander M'Lanahan*, nihil as to *Bernard M'Gee* and *James Gettys*. 2d September, 1826, rule on terre tenants to plead in six weeks or judgment. July 24th, 1827, *John M'Lanahan*, and *Michael M'Lanahan* plead payment with leave, &c. and set off. 2d August, 1827; *exit* notice to *Henry Funk*, served by copy. *Washington* appears for *Samuel Hughes, Jacob Ickus, Barnard M'Gee* and *Martin Funk*, 17th September, 1827, rule on *Henry Funk, Samuel Hughes, Jacob Ickus* and *Martin Funk*, to plead in thirty days or judgment. 18th September, 1827, copy served. *Washington* appears for *James Burns, James Gettys* and *Henry Funk*, and for all the terre-tenants for whom he has appeared, pleads payment with leave to give the special matter in evidence. Plaintiff replies *non solvit*, &c. issue, &c.

The will of *John M'Lanahan*, Sen. having been read, the defendants offered in evidence the following receipt; it having been first admitted that *John Smith* was married to *Jane M'Lanahan*, one of the heirs of *Martha M'Lanahan*, and that the receipt was dated after the death of *Martha M'Lanahan*.

"Received, October the 11th, A. D. 1819, of *John M'Lanahan*, executor of *John M'Lanahan*, Sen. deceased, one hundred dollars, it being in part coming to *John* and *Garrett Smith*, heirs of *Martha M'Lanahan*, deceased, one hundred dollars, received per me,

"*John Smith*."

Which evidence was objected to, and overruled by the court, and exception taken by the defendants.

On behalf of the terre-tenants it was proved that *John Flanagan*, administrator of *Thomas M'Lanahan*, who was one of the executors of *John M'Lanahan*, deceased, in March, 1818, petitioned the orphans' court for an order to sell the real estate of *Thomas M'Lanahan*, his intestate, for the payment of debts, to wit, two hundred and ninety acres of land, being the same estate which he took under his father's will; upon which petition the court granted an order for the sale of ninety-eight acres, part thereof, which in May, 1818, in pursuance of that authority, the administrator sold in parcels, to wit:—nine acres to *Bernard M'Gee*, for six hundred and thirteen dollars twenty-seven cents; twenty-one acres and eighty-seven perches to *Richard Hayden*, for fifteen hundred and eight dollars twenty-six cents; thirty-five acres and ninety-eight perches to *John Oelig*, for twenty-four hundred and ninety-two dollars eighty-seven cents; fourteen acres and one hundred and thirty-seven perches to *Martin Funk*, for eleven hundred and eighty-nine dollars fifty cents; thirteen acres and one hundred

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and thirty-two perches to *James Gettys*, for sixteen hundred and twenty-nine dollars ninety-six cents; amounting, in the whole, to six thousand eight hundred and thirty-one dollars eighty-seven cents, which sales were confirmed by the court.

Subsequently, to wit, in 1821, two judgments were obtained against *Thomas M'Lanahan's* estate, upon simple contract debts, in favour of *John H. Hughes* and *Samuel Hughes, Esq.* and one judgment in favour of *Riddle* for the use of *Calhoun*, upon which a *fi. fa.* issued, the balance of *Thomas M'Lanahan's* estate, to wit, the two hundred acres, was levied, and it was afterwards sold by the sheriff, on the 12th April, 1824, to *John H. Hughes*, for his father, *Samuel Hughes, Esq.* for three thousand five hundred dollars, to whom the sheriff made a deed upon his executing receipts for so much of his judgments.

It was admitted that *Samuel Hughes* and *Jacob Ickus* represent the same interest.

It was also in evidence that *John M'Lanahan, Sen.* at the time of his death was possessed of a large stock of cattle, and considerable other personal estate.

1. The counsel of the plaintiff requests the court to instruct the jury, That the sales of the land of *Thomas M'Lanahan*, one of the devisees under the decree of the orphans' court, does not discharge the said land from the lien of the legacy, devised to *Martha*, the widow,

2, That the sale made by *Archibald Flemming, Esq.* as sheriff, to *John H. Hughes*, for *Samuel*, and the receipt by *Samuel Hughes* of the whole of the purchase money on his judgments, given in evidence to the jury, was a sale, under the circumstances of the case, subject to the lien of the legacy of *Martha*, and that the lien of the same is not discharged by said sale.

3. That if said lands, sold by the decree of orphans' court, or at sheriff sale aforesaid, if discharged at all from said lien, cannot in law be discharged, under the circumstances in evidence, from more than one third of the same, being *Thomas M'Lanahan's* proportion of the same.

The counsel of *Samuel Hughes, Bernard M'Gee, James Gettys, James Burns, Martin Funk* and *Henry Funk*, respectfully requests the court to instruct the jury:

1. That the legacy given to *Martha M'Lanahan*, by the will of *John M'Lanahan*, deceased, is not charged by the will on the lands of the said *John M'Lanahan*, and that plaintiffs cannot recover in this action against the terre-tenants.

2. That the sale of the lands of *Thomas M'Lanahan* to *Samuel Hughes* by the sheriff, by virtue of an execution against the administrator of *Thomas M'Lanahan*, divested the lien of the legacy, and

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that the plaintiff, therefore, is not entitled to recover from the said *Samuel Hughes* in this cause.

3. That the sales made by *John Flanagan*, administrator of *Thomas M'Lanahan*, of the lands of said *Thomas*, under a decree of the orphans' court, divested the lien of the legacy, and that the plaintiff is not entitled to recover in this cause against *Bernard M'Gee*, *James Gettys*, *James Burns*, *Martin Funk* and *Henry Funk*.

4. If the jury believe that *John M'Lanahan*, deceased, left sufficient personal estate for the payment of his debts and legacies, and that his executors are fully able to pay the legacy claimed in this suit, their verdict ought then to be in favour of the terre-tenants.

5. That the plaintiff cannot recover in this form of action.

The court delivered the following charge to the jury, on the points submitted.

In answer to the first point on part of the tenants in possession, the court say, The testator *John M'Lanahan*, devised his whole estate both real and personal to his three sons, *John*, *Thomas* and *Michael*; he appointed them his executors, and ordered them to discharge the legacies in his will. If they paid them at all, it must be out of the fund bestowed on them in the will. There are no words in the will which in express terms make the legacy to his wife a lien on the land devised, but it was to be paid out of the fund placed in their hands, and by necessary implication become a charge on the land in the hands of the devisees and executors, as a part of that fund. There is no evidence before us to shew precisely what the amount of the personal estate of the deceased was. The executors have paid out, on this legacy, one hundred and fifty pounds, and on the other legacies in the will eleven hundred pounds. It is submitted to you to determine whether these two sums, amounting to twelve hundred and fifty pounds, amount to as much as the personal estate of the deceased amounted to at his death. It is even admitted that these funds, arising from the personal estate, ought first to have been applied to the legacy now in suit, yet I am of the opinion that the application of those funds to the payment of the other legacies, which are expressly charged on the land, could not avail the terre-tenants, who claim under the sale made by virtue of the decree of the orphans' court. They come in under *Thomas M'Lanahan*. The payment of the legacies which have been paid, went in discharge of the lien on his land, and they must take it subject to this devise as it stood at the time of the sale. If a suit had been brought by the present plaintiff for the legacy at the time of the sale made by the administrator of *Thomas M'Lanahan*, most clearly his representatives could not have set up as a defence that the funds which ought to have been applied to the payment of this legacy which is charged on this

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land, had been misapplied by appropriating them to the payment of other legacies in the same will, which were also a charge upon the land. If he cannot set up such a defence, the purchasers at the sale under the decree of the orphans' court cannot set it up. They come in under him, and must hold the estate under the will as he held it. There is no proof here that any part of the personal assets of the deceased were wasted by the executors. The court are, therefore, not called upon to say what the effect of such devastavit would be: I am therefore of opinion, that the legacy given to *Martha M'Lanahan* by the will of *John M'Lanahan*, deceased, is so charged on the lands devised to his three sons, that the plaintiff can recover against the terre-tenants who have been brought on the record in this suit, and who defend their interests in it.

First point on part of plaintiff, and third on part of terre-tenants.

That the sale made by *John Flanagan*, administrator of *Thomas M'Lanahan*, deceased, by virtue of the decree of the orphans' court for that purpose, did not divest the lien of the legacy bequeathed to *Martha M'Lanahan*, in her husband's last will, and made a charge on said land by his will, and that the plaintiff in this case may recover a judgment which may be levied on the said lands, and in possession of the several tenants in possession who have been brought on the record, and who have defended their interests in this suit.

Second point on part of plaintiff, and second on part of terre-tenants.

It appears in evidence that a judgment was obtained at the suit of *James Riddle*, for the use of *James* and *Andrew Colhoun*, against *John Flanagan*, administrator of *Thomas M'Lanahan*, deceased, on which a *fi. fa.* was issued, and two hundred acres of land levied on, which were afterwards sold on an *alias venditioni exponas*, returnable to April term, 1824, to *John H. Hughes*, for three thousand five hundred dollars, who, it is admitted, purchased for his father, *Samuel Hughes*. At that time a suit was pending for this legacy, brought to August term, 1822, which was non-suited or abated at August term, 1824, that the money arising from the sale was all settled by the sheriff with *Samuel Hughes* on two judgments; one at the suit of *Foreman, Lane & Co.* against the administrator of *Thomas M'Lanahan*, deceased, and marked on the record for the use of *Holker Hughes*; the other at the suit of *Samuel Hughes*, against the same defendant, by the sheriff taking *Samuel Hughes'* receipt for eleven hundred and eighty-four dollars and fourteen cents on the first, and for two thousand nine hundred and eighty-four dollars and forty-nine cents on the second. Taking into view all these circumstances, and all the other circumstances in the cause, if there be any others

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which have any bearing on this point, if the jury should even be of opinion that *Samuel Hughes* was the owner of the two judgments on which the money arising from the sale was paid, yet the court is of opinion that the sale made by *Archibald Flemming*, sheriff, on the process given in evidence to *John H. Hughes*, and the receipts by *Samuel Hughes*, of the whole of the purchase money, and the judgment given in evidence was not a sale subject to the lien of the legacy of *Martha M'Lanahan*, and, that therefore, the lien of the said legacy was discharged by the said sale so far as related to the land so sold, unless it was expressly understood and agreed at the time of the sale, that *Hughes* purchased it subject to the lien of the said legacy. The circumstance of there being a suit brought for the legacy, or other notice of the existence of it to *Hughes*, at the time of the sale, would not subject the land in his hands to the payment of it.

As soon as the sheriff's deed was acknowledged, the title to the land vested in *Hughes*, discharged of the incumbrance of this legacy, and the sheriff becomes liable to pay to the plaintiff the proportion of the legacy which the land sold bears to the whole amount of the land devised by *John M'Lanahan*, deceased, to his three sons, charged with it. The only evidence before us of the value of the land devised, is that which is furnished by the sale of that part, which by the division made among the three sons of the testator, fell to the share of *Thomas M'Lanahan*, deceased. The amount of the sales made by the administrator is six thousand eight hundred and thirty-one dollars and eighty-seven cents, the amount of the sale made by the sheriff, is three thousand five hundred dollars, in all ten thousand three hundred and thirty-one dollars and eighty-seven cents; the lands were to be equally divided among them. We may suppose, therefore, that the other two shares were equal in value to the share of *Thomas*. The whole land charged with the legacy would be worth about thirty-one thousand dollars. The amount of the sheriff's sale being three thousand five hundred dollars, the proportion that this sum bears to the whole amount of the value of the land charged, if that value is to be ascertained by supposing the other two shares to be worth the same sum that was raised by the sale of *Thomas*' and no more, is as 7 is to 62, so that if the jury should be of opinion that the value of the land should be estimated according to this rate, 7-62, or about 1-9 of the legacy, would be the proportion which ought to have been paid by the sheriff out of the proceeds of the sales made by him of the land to *Samuel Hughes*. That proportion of the legacy which was chargeable in equity on the land sold by the sheriff, is to be credited in this suit. The plaintiff is to look to the sheriff for that part, and for the residue thereof, the remaining lands, devised in the hands

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of the executors of *John M'Lanahan* and *Michael M'Lanahan*, and the several tenants in possession, who are made parties to this cause, are responsible in this suit.

Third point on part of plaintiff

The court have, already, in substance, answered this point. The lands are not, in the opinion of the court, discharged of the lien of the legacy, by the sale made under the order of the orphans' court. The lands in the hands of the executors of *John M'Lanahan*, deceased, and of the tenants in possession made parties to this suit, are discharged from no more of said legacy than the proportion thereof which ought, as the court has said, to have been paid out of the sheriff's sale.

Fifth point on part of terre-tenants.

That the action can be maintained in its present form, and the plaintiff may recover in it.

Fourth point on part of terre-tenants.

If *John* and *Michael M'Lanahan*, the surviving executors, received sufficient of the personal estate of the testator, to pay the debts and funeral expenses of the testator, the other legacies, and the legacy in question in full, that would make them liable to the present plaintiff to pay the whole amount of *Martha's* legacy. But that circumstance would not, however well able the executors may be to pay the legacy, exonerate the land devised to *Thomas M'Lanahan* in the hands of the tenants in possession made parties to this suit, until the legacy was actually paid, nor would it be a sufficient reason for rendering a verdict in their favour in this suit.

The jury returned the following verdict "That they find for the defendants *Samuel Hughes* and *Jacob Ickus*: and that they find for the plaintiff two thousand and forty-seven dollars and eight cents, against the other defendants:" upon which, judgment *de terris*, was entered.

In this court the following errors were assigned, on behalf of *John* and *Michael M'Lanahan*.

1st. The court erred in saying that the lands bought by *Samuel Hughes*, at sheriff's sale were discharged of the legacy.

2d. In saying that if they were discharged, that only one ninth of the legacy was discharged.

3d. In saying that the action could be supported under the pleadings.

4th. In rejecting the evidence mentioned in the bill of exceptions.

And the following errors were assigned on behalf of all the terre-tenants against whom judgment was rendered.

1st. The court erred in saying that the legacy given to *Martha M'Lanahan*, by the will of *John M'Lanahan*, deceased, was charged on the lands devised to his sons by said will.



(John M'Lanahan and Michael M'Lanahan surviving executors of John M'Lanahan, with notice to Jacob Ickus, terre-tenant, v. John Wyant, administrator of Martha M'Lanahan.)

2d. In saying that the sale made by the administrator of *Thomas M'Lanahan*, in pursuance of the decree of the orphans' court, did not discharge the lands so sold from the lien of the legacy.

3d. In saying that one ninth part of the legacy would be the proportion which ought to have been paid by the sheriff, out of the proceeds of the sale made by him of the lands to *Samuel Hughes*.

4th. In saying that the receipt by the executors of *John M'Lanahan* of sufficient personal estate, for the payment of all debts, funeral expenses and legacies in full, together with their present ability to pay the legacy, would not be a sufficient reason for rendering a verdict in favour of the terre-tenants.

5th. In saying that the action could be maintained in its present form.

*Dunlop*, for the plaintiffs in error.

There are three distinct interests represented in this cause. First, the plaintiff, who is interested to preserve the security or fund out of which the legacy to his intestate was payable, and therefore, to maintain the position, that neither the lands sold by the sheriff, nor those sold by the order of the orphans' court, are thereby discharged from the lien of the legacy. Second, the defendants, who in this particular agree with the plaintiff, for the purpose of producing this result, that all the lands which descended from *John M'Lanahan*, Sen. charged with the payment of legacies, in whose hands soever they may be, shall justly contribute their proportion to the payment of those legacies, and that thereby the defendants, the surviving executors, shall not be called upon to pay more than their part in proportion to the lands which they hold. And third, the terre-tenants, whose interest it is, to hold the lands they purchased from the sheriff and administrator, discharged of all lien or incumbrance of those legacies, and to turn those legatees to the sheriff for their money out of the proceeds of sale.

Upon the first error assigned he proceeded to say, that he would first endeavour to satisfy the court that the point had not arisen directly, nor had it been decided by this court, in any case which had been reported in our books; that although an intimation had been given in the case of *Barnit v. Washebaugh*, 16 *Serg. & Rawle*, 410, yet, that was but the opinion of the judge who delivered the opinion of the court, for the point did not arise in that case: and that the authority of the case of *Nichols v. Postlethwaite*, 2 *Dall.* 131. was not entitled to consideration, in consequence of the imperfect and erroneous report of the facts. And secondly, that there was neither legal principle, nor public policy, upon which such a decision could be predicated: that it would violate the spirit and letter of the act of assembly, which authorizes the sale of lands for the

(John M<sup>c</sup>Lanahan and Michael M<sup>c</sup>Lanahan, surviving executors of John M<sup>c</sup>Lanahan, with notice to Jacob Ickus, terre-tenant v. John Wyant, administrator of Martha M<sup>c</sup>Lanahan.)

payment of debts, and provides, that "the purchaser shall hold the land as fully and amply as the debtor had and held the same," to sanction, by judicial decision, the doctrine that the sheriff could sell and convey a greater estate than the debtor had, or could himself sell and convey, and was about to cite authority on this point, when the chief justice said, that this point had been discussed at their last sitting in Sunbury, and the court considered the doctrine as settled against the plaintiff in error; and that, in all cases of judicial sales, the estate sold, passes to the purchaser discharged of liens.

Second error. If the legatees are obliged to come in and claim their legacies out of the proceeds of the sale by the sheriff or administrator, they must claim the whole amount; they come in as judgments, as is said by *Duncan, J.* in the case of *Gause v. Wiley*, 4 *Serg. & Rawle*, 522. There was, therefore, error in the opinion of the court, that only one ninth of the legacy was discharged.

Third error. The terre-tenants should have been made defendants, by being included in the writ, and so summoned by the sheriff. This is an action on the case for a legacy, and the terre-tenants are brought in after suit brought by a notice, and judgment rendered against them, although there is no claim made against them in the declaration of the plaintiff.

Fourth error. In a court of law, a payment to the heir of *Martha M<sup>c</sup>Lanahan*, would not be a good one; but this is an equitable action, and the court ought to have received the evidence mentioned in the bill of exceptions as an equitable payment. *Smith* represented the heir of *Martha M<sup>c</sup>Lanahan*, the plaintiff's intestate, and a part of the legacy to her, under the will of her husband, was paid to him; the legacy was due, there were no debts due by the estate of the intestate, and he was therefore entitled to it, in right of his wife, and received it, and the money could not therefore be recovered back from him, the evidence ought therefore to have been received to protect *John M<sup>c</sup>Lanahan* from a loss of the amount. *Share v. Anderson*, 7 *Serg. & Rawle*, 62.

*Washington*, for the terre-tenants.

1st. *Martha M<sup>c</sup>Lanahan* occupies a different relation to the testator from the other legatees, whose legacies are plainly charged upon the land: the legacy to her is not included among those, which by the will are expressly charged upon the land. The inference, therefore, from this distinction made by the testator, is manifest that his intention was, the one should be a charge upon the land devised, but that to *Martha* should not: and the intention of a testator to charge his lands with the payment of legacies must be clear and manifest. *Lupton v. Lupton*, 2 *Johns. Chan. Rep.* 614. *Keeling. v. Brown*, 5 *Ves. Jr.* 359.

(John M'Lanahan and Michal M' Lanahan, surviving executors of John M'Lanahan, with notice to Jacob Ickus, terre-tenant, v. John Wyant, administrator of Martha M'Lanahan.)

4th. Although lands are expressly charged with the payment of legacies, yet if there is sufficient personal estate to pay them, and the debts, they must be paid out of that fund. *Commonwealth for use of Beelman, v. Shelby*, 13 *Serg. & Rawle*, 348.

*Chambers*, for the defendants in error,

In consequence of the intimation from the court, declined arguing the point, whether the sheriff's sale discharged the lien of the legacy, but contended, that the sale by the administrator did not.

An administrator derives his authority to sell land of his intestate from the act of assembly, which also points out all the duties, which, in the exercise of this authority, he is bound to perform: that act does not require one who is entitled to a legacy payable out of the estate of *John M'Lanahan*, to claim that legacy out of the proceeds of the sale of the real estate of *Thomas M'Lanahan*; nor is the administrator authorized to pay such a claim, although the act does expressly authorize him to pay judgments. The estate is the *interest* which a tenant hath in lands, &c. It was the estate of *Thomas M'Lanahan* which was sold by his administrator, and the proceeds of that sale was not the fund out of which this legacy was payable; nor is there any form of action known to the law by which the payment of it could have been enforced against the administrator of *Thomas M'Lanahan*. *Gause v. Wiley*, 4 *Sergt. & Rawle*, 522. The circumstance of there being no mode by which it could be ascertained what proportion of the legacy the administrator was bound to pay, ought to be a sufficient answer to the proposition to adopt this novel rule.

This is a proceeding in the nature of a bill in equity, and convenient for the purpose of attaining the object; no harm can result to terre-tenants from this form of action, and it is the one pointed out in the case of *Brown v. Furer*, 4 *Serg. & Rawle*, 213. But all objections on this point are removed by the agreement of the terre-tenants to appear and make defence.

The evidence rejected by the court, must have been offered either in the character of a set-off, or of an equitable defence.

It could not have been admitted as a set off because there was no mutuality of debt between the parties; nor as an equitable defence, because it could not be ascertained to what amount such evidence would be admissible: if there were no debts of *Martha M'Lanahan*, there were costs of administration, which is sufficient to shew the illegality of a payment to an heir, instead of a personal representative: *John Smith's* distributive share of *Martha M'Lanahan's* estate could not be ascertained in this suit, and therefore the inconvenience and uncertainty of admitting the evidence at all, under circumstances where there did not exist an absolute necessity for it.

(John M'Lanahan and Michael M'Lanahan, surviving executors of John M'Lanahan, with notice to Jacob Ickus, terre-tenant v. John Wyant, administrator of Martha M'Lanahan.)

The same reason which rejects the evidence of the set-off of a debt, due by an intestate against a claim by the administrator, rejects this evidence, because at the time the evidence is offered, there is no means of knowing what portion of such set-off is payable. *Wolferberger v. Bucher*, 10 *Serg. & Rawle*, 10.

Suppose that advancements had been made by *Martha M'Lanahan*, in her life time, to her heirs, is the court to stop and try to what extent those advancements had been made, in order to know how far the set-off was admissable? If this is the law, it would apply to a case where the trustee of an insolvent debtor brings suit to recover a debt due to the insolvent, the debtor might set-off a claim due to him by a creditor of the insolvent, who would be entitled to a distributive share of the insolvents property, when it would be divided by the trustee.

The legacy is a charge upon the land. *Hassenclver v. Tucker*, 2 *Bin.* 525. *Wutman v. Norton*, 6 *Bin.* 395. Although the legacies to his daughters are expressly charged upon the land devised, this does not effect the legal implication that the legacy to his wife, *Martha*, was also a charge. 1 *Rop. on Leg.* 448-452: it cannot be presumed that it was the intention of the testator to make the legacy to his wife, who was the primary object of his bounty, less secure than those to his other legatees.

If both funds, real and personal estate, are charged with the payment of this legacy, the legatee has a right to pursue either or both until he gets his money. The personal estate of an intestate must first be applied to the payment of his debts; but a creditor is never restrained in his pursuit of either real or personal estate, whichever he may elect, until he collects his debt.

*Washington*, in reply.

The cases in 2 *Bin.* 525, and 6 *Bin.* 395, cited for the defendant in error, strengthen the position which is taken for the terre-tenants, for in either of the cases the *intention* of the testator to charge his land with the legacies is manifest, which is not the case with *John M'Lanahan*.

*Dunlop*, in reply for plaintiffs in error.

If there was error in not making the terre-tenants parties to the action by including them in the body of the writ, their appearance and defence does not cure the error.

It does not appear, in this case, that there were any advancements by *Martha M'Lanahan* to her heirs, or that there were any debts, these difficulties are therefore imaginary.

The opinion of the court was delivered by

**ROBERTS, J.**—We think it clear that the legacy to the plaintiff's intestate, is a lien on the real estate devised to the sons, it is a

(John M'Lanahan and Michael M'Lanahan, surviving executors of John M'Lanahan, with notice to Jacob Ickus, terre-tenant, v. John Wyant, administrator of Martha M'Lanahan.)

principle of English jurisprudence, as well as the unquestioned law of Pennsylvania, that when the real estate is blended by the testator with the personal, the land is charged with the payment of legacies. And the reason assigned is, that the whole will may take effect, and all the legacies be paid, which is justly supposed to be the intention of the testator, when both funds are put into one. 1 *Ves. Jr.* 444, *Kennedy v. Cousmaher*. 2 *Bin.* 531, *Hassenclever v. Tucker*. 6 *Bin.* 396, *Witman v. Norton*. 2 *Dall.* 131, *Nichols v. Postlethwaite*, 2 *Dall.* 131. And this effect is produced by implication, and is not effected by an express charge in favour of other legatees, as has been ruled in *Webb v. Webb*, 1 *Roper on Legacies* 433, a case equally strong with the present, where, in answer to a similar objection the court said, "The testator might use express words of charge in one part of his will, and create a charge by implication in another." The testator, in the phraseology used, and in charging the lands devised, with the payment of the legacies hereafter mentioned, does not so unequivocally express a contrary intention, as to curtail, or in any way interfere with the implication arising from blending the real and personal fund into one.

When a legacy is charged on land, the sheriff's vendee takes the land discharged from the lien of a legacy. And this is the principle of the case of *Barnet v. Washebaugh*, 16 *Serg. & Rawle*, 410, decided after great deliberation, and since repeatedly recognized. And a purchaser of land, sold by order of the orphans' court, is in the same situation as a sheriff's vendee. The 21st section of the act of the 19th April, 1794, enacts, that no lands, tenements and hereditaments, sold by order of the orphans' court, shall be liable in the hands of the purchaser, for the debts of the intestate. The lands went into the possession of the devisee, charged with the payment of the legacies, and was therefore a debt of the intestate as tenant of the land.

Judicial sales, as appears from the whole current of the recent decisions, divests all liens whether general or specific, and the exceptions to the rule, are grounded on special and peculiar circumstances. The land sells better from passing into the possession of the purchaser unincumbered, and it is of no consequence to a creditor who sells it, provided it be sold fairly, and the proceeds faithfully applied. It is the duty of the court to see that no loss results from improper practices, or the want of adequate security, in a sale under their order, and particularly subject to their controul. The proceeds of the sale must, in the first instance, be applied to the payment of liens, which existed in the life time of the intestate, according to their respective priority. By the sale, the money is substituted for the land, to be distributed by the administrator among the creditors, in the order of the respective claims against

(John M'Lanahan and Michael M'Lanahan, surviving executors of John M'Lanahan with notice to Jacob Ickus, terre-tenant v. John Wyant, administrator of Martha M'Lanahan.)

the real fund, which by process of law has been converted into personalty for that purpose. A uniform rule applied to all judicial sales, avoids confusion, and a distinction such as has been adopted by the common pleas, is, we think, contrary to the spirit of all the cases which have been recently decided.

An objection has been taken to the form of the suit; the action is brought against the executor, with notice to the terre-tenant, who appears and pleads, without objection to the manner he was made a party. After this, we are unwilling to reverse the cause on that ground alone.

The most approved form, as appears from the precedents, is to bring the suit against the executors *and* the terre-tenants, who are generally most interested in the cause; for it is on the failure of the personal funds that resort is had to real estate. 2 Saun. 7, (*Jefferson v. Morton, et als.*) The action may be brought either against the tenants of the land generally, without naming them, or against them by name; but the former is the best form, and in England is constantly used; for if the plaintiff undertake to name them, he must name them all, and if he does not, those who are not named may plead in abatement, (*Chahoon v. Hollenbaugh,*) 16 Serg. & R. 432, (*Barresford v. Cole,*) 2 Saun. 7, note 4. When suit is brought against the terre-tenants generally, the sheriff returns specially the tenants of the land, who come in, and either plead generally to the action, or specially, that another person, naming him, was and yet is tenant of the land, and that no process has been yet issued against him, &c. and pray judgment of the court, if they ought to be compelled to answer to the said writ, in form aforesaid returned. And the reason of this plea seems to be, because every tenant of the land is entitled to have contribution, that is, all the lands bound in the hands of the several purchasers, or owners thereof, must be equally charged; therefore, unless all the tenants be warned, the others are not obliged to answer. And if the tenant does not take advantage of the omission in the first instance, by a plea of this sort, which he may do, notwithstanding the sheriff's return, it would seem he loses the benefit of contribution, or of relief by *audita querela*, in case execution is taken out against his land alone. Cro. Jas. 506, *Mitchell v. Croft*. Mun. 525, *Clark v. Hardmiller*. In England, he cannot plead it after a plea in bar. Sir Wm. Jones, 349, (*Eyers v. Cowley,*) 2 Saun. 7, note 10. On the plea, that all the terre-tenants have not been summoned, for the having speedier justice, the plaintiff may pray a writ to summon the person alleged to be terre-tenant, which is granted to him by the court; and by this means, when summoned by the sheriff, he is made a party in the same manner as if he had been summoned, or returned by the sheriff as terre-tenant of the land.

Judgment reversed, and a *venire de novo* awarded.

**LAUGHLIN, Assignee of LAUGHLIN, against ROBERT PEEBLES, Administrator of JOHN LAUGHLIN.**

**IN ERROR.**

A party who has recovered a judgment in the court of Common Pleas, and received the amount of it from the defendant, will not be permitted to reverse that judgment on a writ of error.

*Quere.*—If a plaintiff in error withdraws his writ, and has an entry made upon the docket, "writ of error withdrawn," whether it is not a retraxit, and will not bar another writ.

THIS was a writ of error to the common pleas of Cumberland county. The plaintiff in error was the plaintiff below.

To October term, 1825, a writ of error issued at the instance of the plaintiff, to remove this same judgment; the record was not returned, but on the 12th of October, 1826, this entry was made upon the docket of the supreme court, "writ of error withdrawn." Another writ of error issued to October term, 1829, upon which the record was returned, and several errors assigned, which were now before the court.

*Alexander*, for the defendant in error, moved to quash the writ on two grounds.

1st. That the withdrawal of the writ of error, on the 12th October, 1826, was a retraxit, and is a complete bar to the prosecution of another writ to remove the same judgment. *Beecher v. Sherty*, *Cro. Jas.* 211.

2d. That an execution issued in the court below, at the instance of the plaintiff, upon his judgment, and that he has since received the amount from the defendant: and read a deposition made at the bar, to shew that the plaintiff had received the benefit of his judgment, and also exhibited certain receipts, as further evidence of the same fact.

*Williamson*, for the plaintiff in error.—The withdrawal of a writ of error by the attorney of a party is not a retraxit, which can only be done by the *personal* appearance of the party in court. 2 *Selton's Prac.* 338. *Beecher's case.* 8 *Coke's Rep.* 58. An attorney of a party has no such power. *Jac. Law Dic.* 523.

*Carothers*, on the same side.—A retraxit operates in the nature of a release, and the powers of an attorney are not so comprehensive as to enable him to release the rights of his client.

There were several judgments against the same defendant in favour of the same plaintiff and the receipts are not particularly applicable to the judgment which is removed by this writ of error.

*Alexander*, in reply.—It does not appear by whose direction the entry of "writ of error withdrawn," was made, whether by the

(Laughlin, Assignee of Laughlin v. Robert Peebles, Administrator of John Laughlin.)

party or his attorney: and while it remains upon the record of a court, competent to make the entry, even if erroneous, it is conclusive.

The court being satisfied from the evidence exhibited that the plaintiff had received the benefit of his judgment, on this ground alone, quashed the writ of error.

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(DANIEL GALLATIN, for the use of DANIEL GARBER,  
against LUDWICK CORNMAN and JOHN CORNMAN.

IN ERROR.

Where the defendant, under the act of the 20th of March, 1810, regulating arbitrations, appeals from the award of arbitrators, and a general verdict passes for him, he is entitled to the costs which follow a final judgment: such case is not within the provisions of that act, as to costs, and they are given by the law as it existed before the passage of that act. Where a transcript of the judgment of a justice of the peace is filed in the office of the Prothonotary of the court of Common Pleas, and the judgment is opened, and the defendant let into a defence in that court, and a verdict is rendered for the defendant, the one hundred dollar act, regulating the payment of costs on appeal from the judgment of a justice, does not apply.

Writ of error to the court of common pleas of Perry county.

This case, the facts of which are fully stated by judge Smith, who delivered the opinion of the court, was argued by

Creigh, for the plaintiff in error, who cited *Dearth, et als v. Laughlin*, 16 Serg. & Rawle, 296. *Landis v. Sheaffer*, 4 Serg. & Rawle, 196. *Flick et al v. Boucher*, 16 Serg. & Rawle, 373. *Purdon*, 20. and *Lentz v. Strok*, 6 Serg. & Rawle, 40. And by

Alexander, contra, who referred to *Flick, et al v. Boucher*, 16 Serg. & Rawle, 373.

The opinion of the court was delivered by

SMITH, J.—A transcript of the judgment rendered by justice White, in the above stated action was filed in the court of common pleas of Perry county, and on a *fi. facias* issued thereon, a levy was made on the real estate of John Cornman, one of the defendants. At the instance of John Cornman, this *fi. fa.* was afterwards quashed, the judgment opened, and upon the issue on the plea of payment, the sum due was to be ascertained, the lien of the judgment to remain in the mean time, and the costs to abide the final event of the suit. The cause was then arbitrated, and a report made for the plaintiff for forty-four dollars twenty-three cents, with



(Daniel Gallatin, for the use of Daniel Garber, v. Ludwick Cornman and John Cornman.)

costs, from which the defendants entered an appeal. At the trial, on the 7th of April, 1829, a verdict was returned by the jury for the defendants, upon which a motion was made to enter a judgment without costs, which the court overruled, and entered judgment generally for the defendants. Four errors have been assigned by the plaintiff on these proceedings.

1st. That the court erred in refusing to enter judgment without costs, since the appeal.

2d. That the court erred in allowing the defendants the costs paid by them, at the time of appeal, and which embraced the costs on the original suit before the justice.

3d. That the court erred in allowing the defendants, (who were the appellants,) the fees of their subpoenas, and serving them, their witnesses fees, and daily pay since the appeal, also the jury fee paid to the sheriff for the verdict.

4th. That the execution issued for costs against the plaintiff, when no costs were due to defendants.

The errors may all be considered together. It is to be observed in this case, that neither party appealed from the judgment of the justice; but after the transcript of his judgment had been filed in the office of the prothonotary of the court of common pleas, the judgment was, by consent of the parties, opened, and the cause, after issue had been joined, was put to arbitrators, and when they had decided, the defendants, by an appeal, carried it back to the court of common pleas; it was there tried in the usual form, by a jury, and a verdict and judgment rendered for the defendants. It is then a case to which the provisions of the one hundred dollar act, as to costs on an appeal from a justice's judgment, are not strictly applicable. If, however, the provisions of that act can be considered applicable, the defendants would, beyond all doubt, be entitled to costs on the verdict and judgment, according to the decision of this court, in *Flick et al v. Boucher*, 16 Serg. & Rawle, 373. By the one hundred dollar act, it is declared, that on the reversal or abatement of a judgment, the defendant, when he appeals, shall recover costs, if, on the trial, he has produced no other evidence than he exhibited before the justice: here, no other or new evidence was produced, and therefore, under this act, the defendants would be entitled to costs. But I take the proceedings to have been strictly under the act of the 20th March, 1810, regulating arbitrations, and how the costs of an appeal from the award of arbitrators are to be paid. The 14th section of that act, is the one which has some bearing on the case before us, it provides, that if the defendant, (as here,) be the appellant, the condition of the recognizance shall be, that if the plaintiff in the event of the suit, shall obtain a judgment for a sum equal to, or greater, or a judgment as, or more favourable, than the report of arbitrators, the

(Daniel Gallatin, for the use of Daniel Garber, v. Ludwick Cornman and John Cornman.)

said *defendant* shall pay all costs that may accrue in consequence of the appeal, together with the sum or value of the thing awarded by the arbitrators, with one dollar per day, for each and every day that shall be lost by the plaintiff, in attending to such appeal. This section does not provide for costs, where the plaintiff shall not obtain such a judgment as is mentioned in this section. In the case before us, the plaintiff had no cause of action, and did not recover any thing; nor does that section of the act provide, that the defendant shall recover costs, in case he is successful on his appeal: such a case, it would seem to me, is not provided for by the act. I would then, in such case say, that the law, as it stood before the one hundred dollar act, and the arbitration act, is to govern; and therefore, that the costs in this case should follow the final judgment, which was for the defendants generally.

The judgment of the court below is therefore to be affirmed.

Judgment affirmed.

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BENJAMIN H. MULLIKEN, *against* BARNET AUGHINBAUGH and JOHN CLIPPINGER.

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IN ERROR.

A debt due to one, who is an applicant for the insolvent laws of Maryland, and for whom a provisional trustee has been there appointed, is not subject to a foreign attachment in Pennsylvania, it being in *gremio legis*.

A foreign attachment will lie in Pennsylvania, at the suit of a citizen of another state.

Quere—Whether a foreign attachment abates by the death of the defendant, after interlocutory and before final judgment.

THIS was a writ of error to the common pleas of Cumberland county, to remove the record of a judgment entered upon the following statement of facts, which, it was agreed, should be considered in the nature of a special verdict.

On the 20th of May, 1818, *Aughinbaugh* and *Clippinger*, resident citizens of the state of Pennsylvania, were indebted to *Fahnestock* and *Gaullagher*, for the use of *Henry Fahnestock*, in the sum of four thousand two hundred and seventy-three dollars and eighty cents, which was then payable to the said *Fahnestock* on the 20th May, 1819. On the 4th day of September, 1818, *Henry Fahnestock*, being then a resident of the city of Baltimore, in the State of Maryland, in pursuance of a law of that state, made application for the benefit of the insolvent laws, whereupon certain proceedings were had and done, certified copies of which are now exhibited,

(*Benjamin H. Mulliken, v. Barnet Aughinbaugh and John Clippinger.*)

and agreed to be considered as a part of this special verdict; (*proest same*.) of all which the plaintiff had notice. On the 17th of December, 1818, the said *Henry Fahnestock*, being still a non-resident of the state of Pennsylvania, and then residing in Baltimore as aforesaid, a writ of foreign attachment was issued out of the court of common Pleas of Cumberland county, at the suit of the said *Benjamin H. Mulliken*, also a citizen of the city of Baltimore against the said *Henry Fahnestock*, by virtue whereof the sheriff of said county attached the said debt, owing by the said *Aughinbaugh* and *Clippinger* to the said *Henry Fahnestock*, and so returned the same to the court aforesaid, on the return day thereof: whereupon, at the third term, to wit, the 30th of August, 1819, on motion to the said court, judgment was entered in the said suit for the plaintiff. Afterwards, and to the next term, to wit, November term, 1819, No. 170, a writ of inquiry of damages issued, at the suit of the said *Benjamin H. Mulliken*, against the said *Henry Fahnestock*, to the sheriff, who by an inquest, held on the 29th October, 1819, found that the debt due by the said *Henry Fahnestock* to the said *Benjamin H. Mulliken*, and for which the said foreign attachment had issued, was one thousand seven hundred and sixty-eight dollars and eight cents, all which was duly returned by the said sheriff to the said court, upon the return day of his said writ of inquiry of damages. Whereupon, on the 23d day of December, 1819, and to the next term, to wit, January term, 1820, No. 162, a writ of *scire facias* was issued at the suit of the said *Benjamin H. Mulliken*, against the said *Aughinbaugh* and *Clippinger*, as garnishees of *Henry Fahnestock*, in the aforesaid foreign attachment, which said *scire facias* suit is the same upon the issue in which this special verdict is found.

On the 31st day of July, 1819, and to August term, 1819, No. 297, a suit was brought in the name of *Henry Fahnestock* and *Thomas Gaullagher*, late co-partners in trade, under the firm of *Fahnestock & Gaullagher*, for the use of *Henry Fahnestock*, and now for the use of *Charles W. Karthaus*, provisional trustee of the said *Henry Fahnestock*, against *Barnet Aughinbaugh* and *John Clippinger*, co-partners in trade, under the firm of *Aughinbaugh & Clippinger*; which suit was brought to recover from the said *Aughinbaugh & Clippinger*, the same debt of four thousand two hundred and seventy-three dollars and eighty cents, which had been attached as aforesaid at the suit of the said *Benjamin H. Mulliken*. In this suit, among other things, the said *Aughinbaugh & Clippinger* set up as a defence and gave in evidence the said writ of foreign attachment, at the suit of the said *Benjamin H. Mulliken*, and other writs of foreign attachment at the suit of other plaintiffs. Whereupon, on the 19th November, 1826, the following agreement or stipulation was made and entered upon the record of the said writ, to wit: "It is stipulated by the plaintiff by their counsel, that in the event of a

(*Benjamin H. Mulliken, v. Barnet Aughinbaugh and John Clippinger.*)

recovery in this case, it shall be considered in favour of the persons legally entitled to have the money, and the same to remain in court until it be determined whether the plaintiff or attaching creditors be entitled to receive it. Mr. *Carothers* and Mr. *Watts* appear for *Adam Konigmacher, Benjamin H. Mulliken, Jos. & J. Wilkins, and E. F. Hollowell*, the attaching creditors." "To this stipulation the defendants gave no consent." And afterwards, to wit, on the 22d January, 1829, the following agreement was made, and entered on the record.

"It is agreed between Mr. *Metzger*, counsel for the plaintiffs, and Messrs. *Carothers* and *Watts*, attorneys for the attachment creditors, that the verdict when given in this case is in no wise to effect the attaching creditors mentioned in a former stipulation: but that their rights shall be held as if no such verdict had been given." This agreement was made in open court upon the trial of the cause, when a verdict was then rendered for the plaintiff *Charles W. Karthaus*, for the original debt of four thousand two hundred and seventy-three dollars and eighty-cents, without interest.

It is further agreed that *Henry Fahnestock* died on the       day of       A. D. 1825, and that letters of administration were granted on his estate to the said *Charles W. Karthaus*, in the city of Baltimore, on the 27th day of August, 1829.

Upon the foregoing facts the question is, who is entitled to the money in the hands of *Aughinbaugh & Clippinger*? If the court should be of opinion that the plaintiff in this issue is entitled to recover, then judgment to be entered for the plaintiff in this suit, and for the plaintiffs in the other suits, which by agreement abide the event of this case, and in that event the verdict and judgment at the suit of *Fahnestock & Gaullagher*, for the use of *Charles W. Karthaus*, No. 297, August term, 1819, to stand as a security for the use of the said *Benjamin H. Mulliken*, and the other plaintiffs in foreign attachments, to wit, *A. Konigmacher, E. F. Hollowell, and Jos. & J. Wilkins*, according to the agreement made on the 17th November, 1828, and entered on the record of the said suit as before recited.

But if the court should be of opinion that the plaintiffs in said foreign attachments are not entitled to recover, then judgment to be entered for the defendants, and the said suit for the use of the said *Charles W. Karthaus*, No. 297, of August term, 1819, to be discharged from any incumbrance created by the said writs of foreign attachment, or by the before recited agreements of the 17th November, 1828, and 22d July, 1829.

It is further agreed that *Benjamin H. Mulliken* and *Jos. & J. Wilkins* were citizens of the city of Baltimore, in the state of Maryland, and that *Adam Konigmacher* was a citizen of Pennsylvania at the time when said foreign attachments were issued, to wit, on the 17th December, 1818.

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In the decision of the within special verdict, the facts embraced therein, are to be passed upon and decided, and to have in every respect the same operation in law as if they had been presented duly for decision by pleadings or otherwise.

All the records and papers mentioned in the foregoing special verdict, are hereby agreed to be considered part thereof.

The record of the application of *Henry Fahnestock*, for the benefit of the insolvent laws, in the city of Baltimore, exhibited the following facts.

That in pursuance of "An act relating to insolvent debtors in the city and county of Baltimore," *Henry Fahnestock*, on the 4th September, 1818, applied to the Honourable *Walter Dorsey*, chief judge of Baltimore county, for the benefit of the insolvent laws, and the said judge referred his said petition, schedule and other papers to the "Commissioners of Insolvent Debtors," and fixed the first Saturday of March term, 1819, for the final hearing of said insolvent before the county court. The said commissioners appointed *Charles W. Karthaus* provisional trustee, to take charge of the effects of the said *Henry Fahnestock*, in pursuance of the said act, who entered into a bond in the penalty of one hundred thousand dollars, conditioned for the faithful performance of the duties.

It did not appear that any further proceeding was had in pursuance of said application, or that *Henry Fahnestock* ever afterwards appeared to prosecute his said application.

The court below, (*Reed*, president,) after delivering the following opinion, directed judgment to be entered for the defendants.

The attachment issued in case, and the judgment at the third term was *interlocutory*; a writ of inquiry to assess the damages issued, and was executed and returned—but *no final judgment*, was ever entered thereon. But a *scire facias* issued without such judgment. The omission to have final judgment was not a clerical default, but the neglect of the party; for such judgment could only be entered on motion, and such motion could alone proceed from the plaintiff. By his default, no final judgment was entered *when the defendant died*; whereupon the attachment abated. No writ of *scire facias* can therefore be sustained, nor could it regularly issue. Upon this statement of facts, and by the stipulation in the special verdict, every objection may be taken advantage of, without regard to the pleadings or issue.

Our opinion being decisive on this point, it may not be necessary to consider the other aspects of the cause: there are other points equally fatal to the plaintiff's right to recover.

The transfer of the note to the provisional trustee, under the insolvent laws of Maryland, was a *pledge* of the property for the use of the creditors of *Fahnestock*, generally, although the right of property or title remained in him, and though the proceedings

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were never consummated by the appointment of a permanent trustee:—yet these proceedings were in force when the attachments issued, in December, 1818. If at that moment there was a legal impediment to the issuing of an attachment, its subsequent removal would not make good a writ which had improvidently issued.

Though *Karhaus* may have had no right to sue for the money, he had the possession of the note; and as the legal right of *Fahnestock*, himself, to dispose of it in any way, was suspended or taken away by law—so the law could not interpose to divest the interest which the general creditors had acquired in the pledge; until the proceeding, therefore, was discontinued, the property was locked up in the hands of the provisional trustee.

*Watts* and *Carothers* for plaintiff in error.

In the court below, three objections were made to the recovery of the plaintiff. 1st. That a foreign attachment cannot be sustained by one who is not a citizen of Pennsylvania. 2d. That the attachment abated by the death of *Fahnestock*. 3d. That the proceedings under the insolvent laws of Maryland, divested *Fahnestock* of his interest in the note, so as to make it not the subject of a foreign attachment.

On the first point. Although the preamble to the attachment laws recites an evil to the citizens of our own state, which it was designed to remedy; yet such a construction has been given to those laws as that every man, who sues for his claim in our courts, is considered *quo ad hoc* a citizen of Pennsylvania; and such a practice has been accordingly pursued, as it would be now unsafe to overturn. *Milne v. Morton*, 6 Bin 353.

Second. The circumstance of there having been no final judgment entered upon the return of the writ of enquiry of damages, was but a clerical omission, and one which ought not to prejudice the rights of the plaintiffs; the writ of *scire facias* against the garnishees treats it as a judgment, and it is not competent for another creditor of *Henry Fahnestock* to avail himself of this omission, which is, at all events, but matter of form. But after interlocutory judgment, the death of the defendant does not abate the writ of foreign attachment. In the case of *Fitch v. Ross*, 4 Serg & Ramle, 557, the supreme court have decided, that the death of the defendant, after final judgment, does not abate the writ, and that the personal representatives may be substituted, and may put in bail to dissolve the attachment; and the same reasoning which influenced the court in that case is perfectly applicable to this. That the declared object of the act was to prevent non-residents from withdrawing their effects from the state, leaving their debts unpaid; and this object would be defeated, if, after the plaintiff has run the tedious course of the law, and when he is about to reap the benefits of his pursuit, the death of the defendant dissolved all;

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and his representatives would be at liberty to withdraw from the state, the effects which had been condemned to pay the judgment against him.

Third. The foreign attachment issued here, bound the money in the hands of *Aughinbaugh* and *Clippinger* which they owed to *Fahnestock*. By the law of Maryland, when an application is made by an insolvent debtor, and his papers are referred to the "Commissioners," a provisional trustee is appointed to take charge of the effects of the applicant while the proceeding is pending, and it is determined by the judicial decisions of that state, 2 *Harris & Gill. Rep.* 24, that such trustee is but a recipient, a care-taker of the property during the pendency of the application, and until a permanent trustee is appointed: he cannot sustain an action to reduce the property of the applicant into his possession. *Karthaus* was, therefore, but a care-taker of the evidence of the debt which *Aughinbaugh* and *Clippinger* owed to *Fahnestock*, and had no right under any circumstances, to claim the money due upon it. But inasmuch as it appears that *Henry Fahnestock* never took the benefit of the insolvent laws; but that what he did do, was merely to elude the grasp of his creditors, and never can result in any advantage to his creditors, it is difficult to discover why it should operate to render ineffectual a proceeding by one of his creditors, in our own state, by which his debt would be secured.

*Metzger*, with whom was *Miller* and *Penrose*, for defendant in error.

Process by attachment is not of common law origin, but is secured to the people by positive legislative enactments. Before the passage of the act of 1705, entitled "an act about attachments," the effects of absenting debtors, were not liable to their debts. The act referred to, was passed to remedy this evil. The preamble recites that "whereas the laws of this government have hitherto been deficient in respect of attachments, so that the effects of persons absenting; are not equally liable, with those of persons dwelling upon the spot, to make restitution for debts contracted or owing within this province, to the great injury of the inhabitants thereof," &c. Hence the inference is inevitable that the law was intended for the benefit of the people of this state exclusively. It was so considered by *Washington*, justice, in the case of *Fisher v. Comegna*, reported at large in *Sergeant on Attachments*, page 44. In that case the learned judge refers to the preamble, to ascertain whether a foreign attachment would lie in any case other than debt. "The mischief, as the preamble informs us, says he, was that the effects of absent persons, were not equally liable with those of persons dwelling on the spot, &c. to the injury of the inhabitants of Pennsylvania." "Surely," says the judge, "an inhabitant of Pennsylvania is not less injured by the want of a remedy," &c. It is no answer to the proposition, that a foreign attachment was sustained in the

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case of *Milne v. Morton*, 6 Bin 353, although the plaintiff in the attachment was a citizen of New York. There the objection was not taken. It made no part of the argument of the case. The court was not required to give an opinion on it. Nor are we permitted to indulge in speculations on the subject. It is a statutory remedy, and should be construed strictly. According to the custom of London, the person, claiming its benefit, must reside within the city. Foreign attachment is an attachment of the goods of a foreigner, found within a liberty or city, to satisfy some creditor, within such city or liberty.

The attachment abated, by the death of *Fahnestock*, who died after interlocutory but before final judgment. In the case of *Ludlow v. Bigham*, 4 Dall. R. 47, it was stated in argument, that the defendant's death, after interlocutory judgment, destroyed the attachment. It was considered the settled law. Mr. Dallas, the able reporter of the case, adopts the argument as the law, and goes so far as to ask in a note, whether the death of the defendant, after final judgment, does not abate the writ. The case of *Fitch v. Ross*, 4 Serg. & Rawle, 562 does not militate against this principle. If the opinion, delivered by the court, in that case be carefully examined, it will be found to sustain the proposition. In that case the death was after final judgment. The court treated it as a final judgment, and throughout the judge's opinion, he refers to that circumstance, it being a final judgment, as justifying his opinion, that the attachment did not abate or dissolve, by the death of the defendant.

This is placing the law on its proper basis. By the final judgment a lien is created on the defendant's property. A simple contract debt is changed into a debt by judgment of law in his life time. Thus the law of distribution of an intestate's estate is not impaired. The plaintiff in the attachment does not obtain an undue preference. He is placed in the same situation with a vigilant simple contract creditor, who brings his action of debt, and obtains judgment against his debtor in his life time. Far different would it be, if the death of the party did not abate the attachment, under any circumstances; if death did not abate it after interlocutory, but before final judgment. The writ can only issue against an absent debtor. He has no knowledge of the proceedings. He is not represented in court or out of court. It is an *ex parte* proceeding altogether and the claim may be entirely groundless. Yet under these circumstances a judgment is obtained—for the debt? No, but to enable the plaintiff to issue his *scire facias* against the garnishee. By the judgment no debt is ascertained and fixed. It is merely interlocutory. *Serg. on Attachments*, 20. 2 Arch. Prac. 25, 79. And yet, if the position contended for on the other side be correct, the plaintiff in the attachment, having such a judgment,



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would sweep away all the assets, to the great injury of the rest of the defendant's creditors.

It appears by the proceedings had, under the insolvent laws of Maryland, that the note in question was returned by *Fahnestock*, in the list of his property, on the 4th September, 1818. On the same day, a provisional trustee was appointed by the commissioners of insolvent debtors, to take possession, for the benefit of his creditors, of all his property, estate and effects, books, papers, accounts, bonds, notes and evidences of debt. The attachment did not issue until the 17th day of December, 1818. Here then was such an assignment or transfer of the insolvent's effects, before the issuing of the attachment, as to divest him of his interest in the note, so as not to make it the subject of a foreign attachment. After the transfer, the payee in the note could not bring suit upon it, and appropriate it to his own use. He had pledged it for the benefit of his creditors generally. They had a direct interest in the legal and proper disposition of the money due upon it. They had a vested right, which could not be defeated by *Fahnestock*, his trustee, who held in trust for himself and other creditors, or by any other person. And yet, if the position taken by the other side be correct, we shall be presented with this strange anomaly in the administration of justice, that through the instrumentality of a court of law, money is recovered on a note of hand, in the custody of the law, which the owner himself could not recover. That a plaintiff in a foreign attachment, on *ex parte* proceedings, not much favoured, and often leading to great injustice, could coerce the payment of money which had been previously appropriated to other specific purposes. The law, however, is well settled that the plaintiff in an attachment, stands upon no better footing than his debtor. 3 *Bin. R.* 394, *U. States v. Vaughan*. It is equally well settled, that after the transfer of a chose in action, or any thing else, it ceases to be the object of a foreign attachment. 4 *Dall.* 279. 3 *Bin.* 394. *Serg. on Attach.* 80. 171. 181. 176. 177.

The opinion of the court was delivered by

GIBSON, C. J.—It is a principle both of British and American jurisprudence, that personal property has no locality in respect of the succession, which is always according to the law of the domicile; and the rule is extended by the English courts even to creditors. But in America, the rights of creditors *not owing allegiance to the country of the domicile*, are generally, if not universally determined by the *lex loci rei sitæ*. In the application of the general principle to cases of foreign bankruptcy, the British judges, while admitting the validity of an involuntary assignment, even as regards their own subjects, have inconsistently denied to the bankrupt his share of the benefit under the commission, by subjecting him to the debts of British creditors, from which the certificate purported to

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be a discharge. (*Smith v. Buchanan*, 1 East. 6.) It surely would be more just to the bankrupt, as well as beneficial to the British creditor, to sustain an attachment of effects within the realm. The American courts act more consistently, if not more liberally, in giving effect to the commission as far as they can, without interfering with the claims of those who were not originally bound by it, on the score of allegiance; and this is, perhaps, all that foreign nations have a right to require, as comity is overstrained when it is bestowed at the expense of justice. In *Milne v. Morton*, (6 Bin. 381,) chief justice *Tilghman* has glanced at a distinction between things that are tangible, and therefore susceptible of actual locality, and things invisible, (consisting of debts,) of which he seems to suppose locality cannot be predicated; the accuracy of which, I may, with great respect for the opinions of that learned and excellent judge, be permitted to question. The English courts sustain the title of assignees under a foreign commission, on principles of courtesy, not right; while the preference which we give to the title of creditors, is founded, as we conceive, in duty to prevent foreign interference with the rights of our citizens or others not owing allegiance to the foreign government, over property which accident, consistently with justice and the laws, has subjected to their power. It can, therefore, make little difference in principle, whether the existence of the property be actual or potential, provided recourse may be had to it under the process of our courts; or whether it be corporeal or incorporeal, provided it be a subject of judicial cognisance, as in either case it seems to me, a creditor would be bound by no transfer but that of the debtor himself. But the case at bar is free of difficulty on this or any other head, the attaching creditor being personally bound by the laws of Maryland, and consequently disabled from gaining an advantage inconsistent with those laws by any proceeding here. Whether, in the case of a creditor not thus bound, we should feel it a duty to exercise a greater degree of courtesy towards a sister state, than towards a country with which we are connected by no political tie, is a question about which we intimate no opinion.

Whether the property was bound by the proceedings in Maryland when the attachment was laid, is a distinct and material fact which ought to have been expressly stated, because not only the existence of a foreign law, but the construction which is part of it, is determinable, not by the court, but a jury. There is, however, in the statement of the case, something like an agreement that the court shall pass on matter of fact, which may have been inserted to remedy this very defect. The plaintiff relies on the opinion of the court of appeals, delivered by chief justice *Buchan*, in *Brown v. Brice*, (2 *Harris & Gill*, 24.) in which it was ruled that the provisional trustee is a mere recipient of the property without power to assign it, or exercise any act of ownership in respect of it, but

*See post, p. 388.*

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that of a bailee. And from this it is evident that he has but a qualified property. But of what value to the argument is it, that the ownership of the insolvent debtor was not divested, if the property were *in gremio legis*? And that it was, it is impossible from the nature of the case to doubt. The proceeding in cases of insolvency is a process of distribution among creditors; to accomplish which it is absolutely necessary that the law take possession of the fund. To this end, it is provided in the "Act relating to insolvent debtors in the city and county of Baltimore," passed by the legislature of Maryland, in 1816, that the provisional trustee "shall take possession for the benefit of the creditors of such insolvent debtor, of all property, estate and effects, books, papers, accounts, bonds, notes and evidences of debt." Surely against such possession the courts of Maryland would not permit a creditor to gain a preference by execution or otherwise; and if such preference could not be gained there, a creditor bound by the laws of that state, could use the process of the courts with no better success here.

The property was therefore not subject to attachment by an inhabitant of Maryland; not however because a foreign attachment may not issue at the suit of a non-resident, (for that has never before been doubted,) but because it was previously attached by the laws of Maryland, by which the plaintiff is bound. This decision of the preceding points, relieves us from deciding whether the attachment abated by the death of the defendant between interlocutory judgment, and the execution of a writ of enquiry of damages: a nice and critical question, which we would not determine without more consideration than we have had time to bestow on it.

Judgment affirmed.

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JOHN BAILY, by his Attorney in fact, JOSEPH TREGO,  
against JOHN HERKES and ISAAC SHELLEBARGER,  
Executors of ELIZABETH SNYDER, deceased.

#### IN ERROR.

Parol evidence of the declarations of a testator at the time the will was written, may be received in evidence, to support a presumption that the legacy was redeemed by the testator in his life time.

WRIT of error to the common pleas of Cumberland county.

This was an action of debt brought by the plaintiff against the defendants, to recover a legacy under the will of *Elizabeth Snyder*, deceased, which was bequeathed in the following words, "I give and bequeath to *John Baily*, the boy that was living with me, and

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my deceased husband in his life time, one hundred dollars." The will was dated 21st October, 1824, and proved immediately after the death of the testatrix, on the 23d February, 1826, and read to the jury.

The defendants then offered to prove, by the person who wrote the will, that while writing it, the testatrix said, she wanted to pay *John Baily*, one hundred dollars, according to the request of her late husband, and asked the witness if it were inserted as a legacy in the will, if she could still pay it in her life time; and he advised her to take a receipt for it, or pay it in the presence of a witness, and that before the death of said *Elizabeth*, she did in fact pay the one hundred dollars to *John Baily*.

Which evidence was objected to by the plaintiffs counsel, on the ground, that the bequest in the will is general, and cannot be qualified by parol evidence, so as to shew any particular intention of the testatrix.

The objection was overruled, and exception taken by the plaintiff.

The following is the substance of the testimony then given:—That *David Snyder*, the late husband of *Elizabeth Snyder*, the testatrix, made a will on the 18th July, 1818, by which he bequeathed nearly his whole estate to his wife, and that before his death, which happened the 16th February, 1819, he said to his wife, that he had intended to bequeath to *John Baily*, one hundred dollars, but at the time of writing his will he had forgotten it, and then enjoined it upon her to give *John Baily* one hundred dollars, out of his estate. That in October, 1824, she communicated this injunction of her husband to the person who was at that time writing her will, and her intention to obey it; and after the will was written, she told the witness that if *Baily* should stand in need of the money, before her death, she would pay it to him. The will remained in the possession of the testatrix, and about a year after it was written, she sent for *John Baily*, and said to him, "that her husband had enjoined her to give him one hundred dollars, out of the estate, and she had waited a good while for a favourable opportunity, that it might go to a good use." She then went to the same desk in which her will was, and got a hundred dollars in notes, and gave them to *Baily*. Her will remained in her possession, unaltered, until her death, which happened two or three months afterwards.

The court (*Reed*, president,) delivered the following charge.

*To the Jury*.—There are two points involved in this case, one of law and the other of fact. It is contended that, *Elizabeth Snyder*, having bequeathed one hundred dollars to *John Baily*, in her last will and testament; and that will having been duly proved after her death, that "the words of that will cannot be supplied, contradicted, or explained by parol evidence—and that therefore the

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testimony of *John Bear*, ought to have no influence upon the minds of the jury in making up their verdict." The legal position thus taken by plaintiff's counsel is correct enough, but the consequence does not follow which the plaintiff contends for. The will of *Elizabeth Snyder* is plain and unambiguous, and clearly imports an intention to give the legacy of one hundred dollars to *John Baily*. This is not and cannot be controverted by parol proof. But being admitted, it is competent for the defendant still to shew that the legacy so intended, was in fact paid in the life time of the testatrix. It would be a fraud if the law established any other rule. Taking a case where but one bounty is intended of one hundred dollars, and provision is made by will for conferring that bounty, if paid in the life time of the testator, it would be against his will for the legatee to claim a second bounty of one hundred dollars, afterwards, under the will. The law is then open for the jury to inquire, whether the one hundred dollars named in the will, and the one hundred dollars paid by *Elizabeth Snyder*, in her life time, constitute the same sum. If but one bounty was intended, and that was distinctly paid by Mrs. *Snyder*, in her life time, in full and complete satisfaction of the whole, then the plaintiff cannot recover. But if the two sums were different—one intended as the bounty of her husband, and the other as her own bounty, then the plaintiff ought to recover. This is a question of fact for the jury—you ought to be well satisfied that the payment of the one hundred dollars in her life time, was not in lieu of the same one hundred dollars mentioned in her will, before you find for the plaintiff.

In this court, the admission of the evidence mentioned in the first bill of exceptions, and the charge of the court, were assigned as errors.

*Watts*, for plaintiff in error.

The rule of law is unquestioned, that a will is not to be expounded by any thing but itself; and this rule as applicable to this will, is clearly expressed in the case of *Innes v. Johnston*, 4 Ves. 573, where it is said: "It turns out that there was among the assets one bond for the exact amount of the legacy; but there were many other bonds belonging to the testator, and it was insisted, and *very properly*, that the court is to determine, upon the face of the will, whether the legacy be specific or pecuniary, and not to travel into the account of the effects, to see whether that shall be turned into a specific legacy, which upon the face of the will is to be taken as pecuniary." The same doctrine is laid down in *Andrews v. Emmot*, 2 Bro. C. C. 297, by Lord *Eldon*, in *Nannoch v. Horton*, 7 Ves. 400, in 1 Ves. Jun. 285, and in 1 *Rop. on Leg.* 273. There is a class of cases founded in the relation between parent and child, wherein a court of equity, without any intention expressed by the father, raises a *presumption* upon the natural obligation he

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owes to his child. That a gift, either by deed or will, is intended not merely as a bounty, but a *portion*; but the same presumption does not arise between the legatee and a stranger, or even a putative father. Where a stranger or putative father gives a legacy for a *particular* purpose, *expressed* in his will, and afterwards advances money for the *same* purpose, it is an ademption of the legacy. 1 *Rop. on Leg.* 272. It follows that if this purpose is not expressed in the will, it cannot be made appear by parol evidence. In this case, the same evidence which proved the payment of the one hundred dollars, to *John Baily*, established the fact, that it was paid in pursuance of the injunction of the husband of the testatrix, or in other words in discharge of the obligation she owed to her husband, it was in fact the bounty of her husband. The parol evidence admitted by the court so explained and qualified the bequest in the will, as to shew, that the *intention* of the testatrix in her will, was, in that way to comply with the injunction of her husband, that she did not intend the legacy as a bounty of her own, as it appeared in the will to be, but the bounty of her husband.

*Carothers*, for defendant in error, whom the court refused to hear.  
Judgment affirmed.

JOHN MOORE, the elder, JOHN MOORE the younger, JAMES M'CORMICK, JAMES GIVEN and GEORGE WILSON, Administrators of WILLIAM MOORE, deceased, appellants, against GEORGE KLINE, Jun. appellee.

M. obtained judgment, in November, 1808, upon which he issued a *sci. fa.* to *August term*, 1810, to which the plea of payment was put in, and issue joined thereon. His counsel was appointed president judge, and in 1816 a list of causes in which he had been concerned, and among them this, was certified for a special court. On this list the words, "*settled says Mr. Duncan*," were written in the hand-writing of the judge, in the entry of this cause; and again, on another list, certified in 1817, the word "*settled*." Mr. D. was counsel for the defendant, and these entries were never transferred from the trial lists, but in 1823, they were on motion ordered to be stricken out, and in 1825, a verdict and judgment rendered for the plaintiff. *Held* that the lien of the judgment remained, and was not postponed to a judgment obtained against the defendant after these entries had been made, and before they had been stricken out.

A trial list, certified under an act of Assembly for holding a special court, forms no part of the *record*; it is the private paper of the judge, which he has a right to do with as he pleases, and the entries made upon it by him, are intended for his own information.

This was an appeal from the decree of the court of common pleas of Cumberland county, distributing the proceeds of the sale of

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the real estate of *George Kline*, Sen. deceased, made on execution by the sheriff of that county, and upon a rule, brought into court by him for distribution on the 15th May, 1828.

The appellants claimed the money upon a judgment entered against *George Kline*, Sen. in November, 1808.

A *scire facias* issued on this judgment, No. 18, to August term, 1810; in which a rule to plead was entered, on the 10th of October, 1810, and the plea of payment put in, and an issue joined upon that plea.

*James Hamilton*, Esquire, who had been counsel for the plaintiff, was appointed president judge of the ninth judicial district; and upon his appointment, a list of causes in which he was concerned, was made out, in 1816, for a special court to be held by judge Franklin.

This cause was entered on that list, and the words, "*settled says Mr. Duncan*," were marked to the entry of it on the list, in the hand-writing of the judge. Mr. *Duncan* was then the counsel for the defendant, *George Kline*.

On the 20th of March, 1817, the prothonotary certified another list of causes, in which judge *Hamilton* had been concerned, for a special court appointed to be held by judge *Scott*. This cause was again put down on this list, and the word "*settled*," entered in it in the hand-writing of judge *Scott*.

Neither of these entries were ever transferred; but the certified trial lists remained in the prothonotary's office of the county. On the 15th of May, 1823, a rule, at the instance of the plaintiffs, in the judgment, was obtained "*to shew cause why the last entry made by the court in this cause should not be stricken out, having been made by mistake, and without authority*;" and on the 10th December, 1824, this rule was made absolute. The cause was tried on the 25th August, 1825, and a verdict and judgment in favour of the plaintiffs, for thirteen hundred and twenty-three dollars and sixty-nine and an half cents, were rendered.

*George Kline*, Jun. claimed the money on a judgment of the court of common pleas of Cumberland county, against *George Kline*, Sen. entered the 3d November, 1818, for nineteen hundred and ten dollars.

The decree of the court of common pleas of Cumberland county, was in favour of *George Kline*, Jun. and postponed the judgment of the appellants. The question raised upon the exception to this decree, was as to the effect of the entries made on the trial lists in the suit in favour of the appellants.

*Williamson* and *Metzger*, (with whom was *Parker*,) for the appellants, contended, that entries made on the trial lists, and not transferred to the appearance or continuance docket, cannot have the effect of postponing the judgments of the appellants to that of the

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appellee. They were made by mistake, and as between the parties they are wholly nugatory.

The only ground upon which they can be made to operate in favour of the subsequent judgment creditor, is, that he *may* have advanced his money on the faith of these entries, as evidence of the *satisfaction* of the antecedent judgment. Now if this judgment creditor did so advance his money, and take a judgment for it, he must prove it: and his simple allegation of the fact will not suffice. No direct evidence is attempted on this point, and the existence of the entries on the trial lists will not justify the inference.

There is no proof that he had actual notice of these entries, and the entries themselves do not afford evidence of constructive notice. And, without the one or the other, it is manifest that the subsequent judgment creditor is not prejudiced.

The entries were not *on the record*, nor *of record*. A record is the enrolment of the doings of a court of record. These trial lists were directed by the act of assembly to be made out, and *sent* to the judge. *Purd. Dig.* 337. They were his private papers, and might have been kept or destroyed by him: and in truth, although found in the office, they were never filed or preserved with the care usually taken of records. In the case of *Black v. Dabson*, 11 *Serg. & Rawle*, 94, it was decided, that to preserve the lien of a judgment beyond five years after its entry, the *cessat* must be entered *on the record*. It is not enough that it is endorsed on a paper filed in the cause. If this strictness be required to preserve a lien, the same strictness, by a parity of reason, should be required to defeat it: and the entry in the one case, as in the other, must be made *on the record*, to have any effect. *Lessee of Hiester v. Fortner*, 2 *Bin.* 40. *Peebles v. Reeding*, 8 *Serg. & Rawle*, 496. *Weilder v. Farmers' Bank of Lancaster*, 11 *Serg. & Rawle*, 139.

*Alexander and Carothers* for the appellees. A record is the evidence of the doings of a court of record, and these entries come within the definition. They are in the hand-writing of the judge, and made by him in court, as evidence of the doings of that court, in the proper case. And it was so treated by the plaintiff himself. No continuances were entered from 1816 to 1823, and the plaintiff's counsel then moved to strike out the *last* entry made by the court in this cause. At that time *George Kline*, Sen. was dead, and the plaintiff prevailed in his motion, and afterwards obtained a verdict.

But whether the entries be of record or not, is of no consequence. They were made in this cause, and estopped the plaintiff to deny their verity so far as respects subsequent judgment creditors. *Bebes v. Bank of N. York*, 1 *John. R.* 546.

To avoid this effect, it was incumbent on the plaintiff to show that the subsequent judgment creditor had notice that the entries were wrong.



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The word "settled," means satisfied. *Berks and Dauphin Turnpike Co. v. Myers' Ex'rs*, 11 *Serg. & Rawle*, 123. *Commonwealth v. Stoeber*, 1 *Serg. & Rawle*, 480. 1 *Phil. Ev.* 80.

The principal must disavow the act of his agent, or it is binding on him. *Bredin v. Dubarry*, 14 *Serg. & Rawle*, 27. If therefore these entries were made by consent of the attorney in the cause, his authority to do so, should have been promptly denied. It is against equity, after the lapse of so many years to permit him to do it, to the prejudice of an innocent third person, who subsequently acquired rights.

The appellee confided in this entry, and in faith of its truth his money was advanced. He, by referring to the docket entry would perceive that this cause had gone into the special court, and the act of assembly would inform him that a certified list had been made out: this would put him on enquiry, and would result in a knowledge of the entries made on the trial list. And in point of fact, this was the case, although no direct evidence could be given of it.

The issuing of the *scire facias* did not continue the lien. *The Creditors of Treichler v. Bower*, 7 *Serg. & Rawle*, 73.

The opinion of the court was delivered by

ROGERS, J.—The act of the 4th April, 1798, prescribes that a judgment shall not continue a lien for a longer term than five years, unless within that time a *scire facias* be sued out by the plaintiff. This *scire facias* was sued out in due time, but it is contended, that notwithstanding the plaintiff has lost his lien, because he has not pursued the remedy pointed out by the act with the requisite diligence. In a case at Philadelphia, not yet reported, the court decided that when a *scire facias* had been issued, but *not returned*, and when it appeared that no steps whatever had been taken to prosecute the suit, that there was such gross negligence, as to amount to an abandonment of the writ. That the mere issuing a *scire facias*, without more, was not sufficient to keep up the lien for an indefinite length of time. That, however, is not the case, and we are unwilling to extend the principle further than is warranted by the terms of the case to which we have referred.

This *scire facias* was issued, returned served, a plea of payment put in, and the cause put to issue, and placed on the trial list from time to time. At a special court held by judge *Franklin*, an entry of "settled," was made on the trial list, at the suggestion, as it appears of Mr. *Duncan*, who, at that time, was the counsel for the defendant. When again put upon the list of the special court, a similar entry was made by judge *Scott*, but at whose instance does not appear—possibly at the instance of the same counsel, or per-

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haps caused by a hasty reference to the entry previously made. The cause appears regularly continued on the docket; nor shall I stop to inquire when those entries were made, or is it material. On the 13th May, 1823, the entry "settled," was on motion stricken out by the court, having been made by mistake and without authority. After this, I can perceive no indication of an abandonment of the writ, or any thing that amounts to gross negligence. When we consider the peculiar situation of this cause, we can be at no loss to perceive why it was suffered to slumber on the docket. In all probability neither the plaintiff nor his counsel were aware of the entry; for if made in his absence, the trial list would be the last place where he would expect to find it. He would be guided by the entries made by the prothonotary on his docket. It appears to me to be dangerous to adopt a latitude of construction as regards this act, as we would introduce uncertainty, as to what degree of diligence is necessary to continue the lien of a judgment. Numberless questions will arise from an attempt to superadd a limitation to the lien of a judgment, not warranted by the terms of the act itself. Independent of any statutory provision, the judgment and the lien were co-existent, and it is the same now, when a *scire facias* has in fact issued within the term of five years; except in the case of a writ without any return of the sheriff, and without any steps whatever being taken in prosecution of the suit.

The entry "settled" generally, or settled says plaintiff's or defendant's attorney, is often made: it is certainly a loose mode of doing business; but I am not prepared to say it is a nullity, when on the record. It would perhaps amount to an entry of satisfaction, or a discontinuance. However that might be, I cannot agree to give the entry, "settled," under the circumstances of this case, that effect. It is a memorandum on the trial list furnished the judge of the special court, under the act of 1816, and which forms no part of the record. The trial list is his own private paper, which he has a right to do with as he pleases, and which, in fact, some judges convert, without scruple, to their own private purposes. In practice it is usual in some counties to make out two trial lists, one for the court, the other for the bar, and in addition the prothonotary keeps a minute book, in which he marks the style of the suit, the proceedings in the cause, comprising the amendments to the pleadings, the names of the jurors, and the verdict, &c. and these entries he afterwards transfers to the continuance docket. In the trial list furnished the court, the judge makes his memorandums, which are intended for his own information and guidance during the term, noting the causes that are continued, those marked for argument, and when tried, states in short,

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"tried," and sometimes, though not always, whether the verdict was for the plaintiff or defendant, and the amount of the verdict. Sometimes the judge takes the list with him, sometimes he leaves it in his drawer, and at other times with the prothonotary: and whether he does the one or the other, is more frequently the result of accident than design. That an entry on a paper such as this, should have all the sanctity and inviolability of a record, would, I apprehend, introduce a laxity of practice pernicious in the extreme to the suitors. A record should be fixed and certain, and not depending as to its place, or in any other way, on the whim of any person. It is not my intention to define what in Pennsylvania constitutes a record, but it will be sufficient to shew, that a trial list of the judge does not partake of that character. If this entry be a record entry in this respect, it must be so in all others, and then it would follow, that a judgment entered on the trial list, and not transferred to the continuance docket or any further notice taken of it, would effect subsequent purchasers, and in many cases the utmost degree of diligence on his part would not avail to avoid loss. To what does a purchaser look for the existence of judgments; not surely to the trial list, but to the docket: and if not regularly entered there, it would be contrary to every principle of justice, that he should be injured: for in such case he would have no notice, either express or implied. The advocates of the contrary opinion, seem to me to be carried away with the hardship of the plaintiff's losing his debt, when he has obtained a verdict and judgment. But is it not much more hard, that the innocent purchaser should bear the loss, when he has taken every pains to inform himself by regular searches in the proper offices. It is the duty of a plaintiff who obtains a judgment, to see that the regular entries are made; and if any loss arises from the default of the prothonotary, it is the plaintiff, from whose neglect, in some measure, it has arisen, who should bear the burthen of a law suit, and not a subsequent purchaser, who had nothing to do with the transaction, and who has taken every pains, by the necessary searches, to inform himself of the existence of liens.

HUSTON, J. and SMITH, J. dissented.

*Decree of the court of Common Pleas reversed, and  
a decree entered for the appellants.*

{ DANIEL BEITLER and JACOB HOKE *against* GEORGE ZEIGLER,

Penrose &  
Watts  
lpw 135  
Case 1  
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IN ERROR.

The judgment of *quod computet* in an action of account render is interlocutory, upon which a writ of error will not lie.

ERROR to Adams county.

This was an action of account render, upon which judgment *quod computet* had been entered by default upon rules to plead, and at the instance of plaintiff, auditors were appointed, when this writ of error was sued out; which

*Stevens*, for defendant in error, moved to quash, on the ground that a judgment *quod computet* is not a final judgment upon which a writ of error will lie.

PER CURIAM.—Let the writ be quashed.

ALEXANDER SEARIGHT *against* GEORGE CRAIGHEAD  
and GEORGE EGE, who survived DANIEL FUNK.

IN ERROR.

The acknowledgment of a debt, barred by the statute of limitations, by a partner after the dissolution of the partnership, does not operate to revive the debt, and avoid the statute of limitations, as to the other partners.

ERROR to the court of common pleas of Cumberland county.

This case, the facts of which are sufficiently stated in the opinion of the court, was argued by

*Alexander*, for the plaintiff in error, who cited *Yea v. Fouraher*, 2 Bur. Rep. 1099. *Wister's Ex'rs v. Gray's Adm'rs*, 5 Bin. 583. *Sluby v. Chomplin*, 4 John. R. 461. *Morris' Lessee v. Vanderin*, 1 Dall. 65. *Miles v. Moodie*, 3 Serg. & Rawle, 211. *Henwood v. Cheesman*, *ibid.* 500. *Fries v. Boiselet*, 9 Serg. & Rawle, 128. *Quantock et als, v. England*, 5 Bur. Rep. 2630.

*Penrose and Carothers*, contra, who referred to *Fries v. Boiselet*, 9 Serg. & Rawle, 129. *Eckert v. Wilson*, 12 Serg. & Rawle, 393. *Weister's Adm'rs v. Gray's Adm'rs*, 5 Bin. 573. *Slocum v. Perkins*, 3 Serg. & Rawle, 295.

The opinion of the court was delivered by

SMITH, J.—The original action was brought by the plaintiff in error against the defendants, on the 11th of December, 1823, to

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recover the value of certain goods sold and delivered. The defendants pleaded *non assumpserunt*, and *non assumpservunt infra sex annos*. Issues were joined, and, at the trial, a verdict was returned for the defendants, and judgment thereon rendered. Certain points had been presented to the court, to the answers to which, exceptions were taken by the plaintiff's counsel, and are now assigned here for error.

Two errors have been assigned upon the charge of the court, on the subject of the act of limitations; and in answer to the points put by the plaintiff's counsel. The court were requested to charge the jury, "That if *Ege* offered to pay one third of the debt, the offer was effectual as to the whole debt, for if liable at all, he is liable for the whole." To which the court below answered, (and so instructed the jury in their charge,) "That the suit was a joint one, against the defendants as partners. The claim was against the three defendants, as liable jointly, and severally for the whole; and that an offer by *George Ege*, under these circumstances, after suit brought, to the plaintiff's attorney, to pay him one third of the debt; for the purpose of getting the lien of the whole judgment removed from his land, and the offer not accepted, would not in law remove the operation of the statute of limitations; such an offer under such circumstances, would not remove the barrier against the plaintiff's recovery, if it otherwise existed. This point is vague and uncertain in its terms; as applicable to the evidence in the cause, we cannot answer it in the affirmative.

"It is unnecessary to consider it as an abstract proposition, not referring to any evidence in the cause."

If this answer of the court be considered with reference to the law, as to an offer to compromise a disputed claim, nothing is better settled than that such an offer, not accepted, can never be used as evidence against the party who made it. This is abundantly clear from the case of *Slocum v. Perkins*, 3 Serg. & Rawle, 295.

But if this answer be considered with reference to the time, and substance, to which the evidence on which it is a commentary, relates, it then presents another question, which may be considered with the second error alleged, as it is involved in it.

The plaintiff's counsel requested the court to charge the jury, "that a promise made after suit brought, is as effectual as if made before," which the court refused to do, and charged the jury in the negative of this proposition.

It may be remarked, that the court below gave the plaintiff the full benefit of the evidence as to the declarations made by *George Ege*, "that, if the debt were a just debt, he would not plead the statute of limitations," as the court submitted it as a matter of fact, from the evidence, whether this admission was qualified by the expression of unwillingness to pay, and a denial of the honesty

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of the debt: and indeed the plaintiff has not assigned specifically for error, the charge of the court with regard to this evidence, although elicited by another point put by him.

An able English judge has said, that the two best statutes in their books are the statute of frauds and the statute of limitations. Conflicting, and indeed inconsistent decisions, upon the latter statute, are, however, to be found in the English books of reports. And some of them are unquestionably, a plain departure from the express provisions of this most salutary statute; and at one period seemed to threaten it with destruction, by a kind of judicial legislation; and until lately a struggle seems to have been made to avoid the effect of it.

It would appear, in tracing this subject, that at first, all agreed, that there must be an *express* promise to take a case out of the statute. Afterwards, it was decided, that an acknowledgment of the debt, was at the utmost only evidence from which a promise to pay might be inferred by the jury; but if a bare acknowledgment only was found by them, it would not be sufficient. Then *Lord Mansfield* held, that a bare acknowledgment of a debt, even after action brought, would be sufficient to sustain the action, although not commenced, till after the expiration of the six years. And we are told, (and that by an English judge,) that this was adhered to till the principle was carried to such a degree of absurdity, that a declaration of a defendant that he would not pay, *5 Maul & Sel. 75*, was held a sufficient acknowledgment to take the case out of the statute. The cases themselves can hardly give us further light, but rather tend to confuse and mislead; and the force of precedent which they established, for a long time restrained judges from vindicating the statute, and placing its construction on rational grounds, although almost at every step, they mourned over the condition to which it had been reduced. Our own courts had followed these decisions to their full extent; but the supreme court of this State was the first, or among the first, to discover that the decisions had gone too far—and the case of *Wister's Ex'rs v. Gray's Adm'rs.* in *5 Bin. 573*, (and the decisions hereafter cited,) led the way to a rational construction of cases under this law. In *England*, the courts have been retracing their steps, and have got, or are getting, back to the plain construction and meaning of the statute.

Reason, then, has at last prevailed over precedent, and the statute has been restored to what the legislature originally intended it to be, a protection against stale and dishonest claims, the evidence as to which has been consumed by time, or otherwise lost.

To take the case out of the act of limitations, an express promise to pay is not necessary, but if the plaintiff rely on admissions of the defendant, he must show such admissions as may fairly support the inference of such a promise. If, therefore, the admission be *qua-*

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lifted in a way to repel the presumption of a promise to pay, or if it be accompanied with words inconsistent with a promise to pay, it is not evidence of a promise to take a case out of the act of limitations. *Eckert v. Wilson*, 12 *Serg. & Rawle*, 393. *Roosevelt v. Waite*, 6 *John. Chan.* 290. *Clementson v. Williams*, 8 *Cranch*, 72. *Fries v. Boiselet*, 9 *Serg. & Rawle*, 128.

It is settled, that the acknowledgment of a debt by one partner, after the dissolution of the co-partnership, is not sufficient to take the case out of the act of limitations as to the other partners. *Bell v. Morison et al.*, 1 *Peters*, 373, lately reported. But in the case before us, the admission, such as it was, was not only after suit brought, and long after the act of limitations had run against the debt; but after all connection had ceased to exist between the defendants as partners on their contract to make the road in 1814; for we find in 1821, the accounts were finally settled between them, and balances struck.

The admission then was by one partner, (taking it for granted that the defendants had been partners,) after the dissolution of the co-partnership, and after suit brought. I am aware that in the case of *Wistar's Ex'rs v. Gray's Adm'rs*, 5 *Bin.* 573, it has been decided, that an admission, which takes a case out of the act of limitations, does not operate to revive the old debt; but is the evidence of a new promise, of which the old debt is the consideration; but without stopping to inquire, whether such admission, after suit brought, is sufficient in an ordinary case, we proceed to consider the other question involved. Is such admission, made by one partner at any time, after the dissolution of the firm, effectual for this purpose? This part of the case has in fact been recently decided in two cases, which I will mention. The law is well settled, that after the dissolution of a partnership, the partners cease to have any power to make a contract in any way binding on each other. The dissolution puts an end to the authority, and operates as a revocation of all power to create new contracts. This principle, taken in connection with that already referred to, that the admission is evidence of a new promise of which the original debt is only the consideration, brings us to the conclusion, at which the supreme court has already arrived, after full argument, that the acknowledgment by a partner, after the dissolution of the co-partnership, will not take the debt out of the act of limitations, so as to make the co-partners liable. This point was so decided in Philadelphia, at the December term, 1827, of this court, in a case in which his honor, justice *Rogers*, delivered the opinion of the court, which will be reported. It was also, a short time afterwards so decided by the supreme court of the United States, at their January term, 1828, in the case above cited, of *Bell v. Morrison, et al.*, reported in 1 *Peters*, 351. 373, where, in the very able and elabo-

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rate opinion of that court, delivered by Mr. justice *Story*, it is said, "that after the dissolution of a partnership, no partner can create a cause of action against the other partners except by a new authority communicated to him for that purpose. It is wholly immaterial what is the consideration which is to raise such cause of action; whether it be a supposed pre-existing debt of the partnership or any auxiliary consideration which might prove beneficial to them. Unless adopted by them, they are not bound by it. When the statute of limitations has once run against a debt, the cause of action against the partnership is gone. The acknowledgment, if it is to operate at all, is to create a new cause of action, to revive a debt which is extinct; and thus to give an action which has its life from the new promise implied by law from such an acknowledgment, and operating and limited by its purport. It is then, in its essence, the creation of a new right, and not the enforcement of an old one. We think that the power to create such a right does not exist, after the dissolution of the partnership, in any partner." After this, to say more on this subject, or to run through a bead-roll of cases, for information, when the case itself has been so recently decided by two of the highest tribunals, would really be an idle parade, or waste of time. It is only necessary to add that there is no error in the decision of the court of common pleas, and the judgment is therefore affirmed.

Judgment affirmed.



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**JOHN S. BRADY, SAMUEL LYON and SAMUEL MURDOCK, Executors of PARKER CAMPBELL, deceased, against ANDREW COLHOUN and JAMES COLHOUN, Administrators of JOHN COLHOUN, deceased,**

**IN ERROR,**

*Campbell*, in 1805, bought of *W.* 5000 acres of land at four dollars per acre. The purchase was at a credit of eight years, with interest at three per cent. after which the principal was to be paid at three, six and nine years, reserving six per cent. on unpaid balances. By settlement made in 1819, *Campbell* had paid the interest to *W.* up to that time, and four thousand four hundred and twenty-nine dollars and forty-two cents on account of principal.

In an action of assumpsit, brought in 1827, after *Campbell's* death, against the administrators of *Colhoun*, for money so paid to *W.* in which the evidence to charge the defendants consisted of a series of letters written by *Colhoun* to *Campbell* from 1805 to 1814, from which it appeared that *Colhoun* had been let into a participation in *Campbell's* purchase; held that six letters from *Campbell* to *Colhoun*, in a period of as many years, from 1814 to 1820, in which there was no allusion to the subject, were evidence of the recession of the agreement between *Campbell* and *Colhoun*.

The liability of *Colhoun* to contribute for the payments of *Campbell* whether more or less than his proportional part, would depend on whether the parties had agreed to apportion the profit or loss, which was a fact for the jury.

There may be a partnership to trade in land, and it may, as in any other case, be limited to purchasing only, the profit and loss being divisible as stock; but this relation does not necessarily or naturally arise from the bare circumstance of a joint purchase.

Joint purchasers, without an agreement of partnership, would not be entitled to the remedies, nor subject to the responsibilities of partners.

If *Campbell*, as a joint purchaser, paid all the interest as it became due, a right of action for a moiety of each payment, accrued instantly to him against *Colhoun*, which would be barred by the statute of limitation, when six years had run before suit brought.

The court below charged the jury, that if the contract were not rescinded between *Campbell* and *Colhoun*, the former could recover for interest paid. The jury found a general verdict for defendants. Held that it appeared that the jury went on a distinct ground of fact, "*the recession of the contract*," and if error had been committed in the charge as to the principal, this court would not reverse on that ground, as it was without prejudice to the party.

WRIT of error to a special court of common pleas of Franklin county,

This suit was an action of *indebitatus assumpsit*, brought by the plaintiffs for money paid, laid out and expended, by the plaintiff's testator for the defendant's intestate.

*Parker Campbell*, the testator, on the 25th day of May, 1805, contracted with the *Washington College*, for the purchase of five thousand acres of land, in Beaver county, for which he agreed to

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pay four dollars per acre. By the agreement, interest at three per cent per annum on the purchase money, was to be paid for eight years; when so much of it as remained unpaid, was to bear interest at six per cent. the interest to be paid semi-annually, and the principal was to be paid in equal payments, at intervals of three years, after the expiration of eight years.

No deed was executed by the *College* to Mr. *Campbell*, but the *College* retained the legal title as a security for the payment of the purchase money. On the 1st of October, 1819, it appeared by a settlement then had with the *College*, that Mr. *Campbell* had paid the interest up to that time, amounting to fifteen thousand dollars, and the sum of four thousand four hundred and twenty-nine dollars and forty-two cents, which was credited on account of the principal by the *College*.

In the year 1824, Mr. *Campbell* having failed to make further payments, the *College* brought ejectments to recover the lands sold, obtained judgments by arbitration, and possession under them. The whole negociation with the *College* was in the name of Mr. *Campbell*, and Mr. *Colhoun*, who was the father-in-law of Mr. *Campbell*, was not known in the contract by the *College*; but to prove his connection with it, and make him liable for a portion of the purchase money paid, letters from him to Mr. *Campbell*, dated in 1805, 1806, 1807, 1813, and on the 8th of June, 1814, were given in evidence, in which, Mr. *Colhoun* admitted that he was interested in the purchase; spoke of Mr. *Campbell* calling on Mr. *Reed* for one half of the interest on the purchase money; called it his part of the interest, and informed Mr. *Campbell* that he had a number of advertisements printed for the sale of "our *Academy* lands," and would distribute them.

The defendants, who conceded, that at one time there had been a contract of some sort between the parties, for the purchase of these lands, relied on evidence to show that it was abandoned, and with this view, offered in evidence six letters, dated respectively the 19th September, 1814, 5th September, 1815, 11th December, 1816, 5th November, 1819, and 27th May, 1820, from Mr. *Campbell* to Mr. *Colhoun*, and in which no allusion was made to the purchase of the college lands. To this evidence the plaintiffs objected; but it was received by the court, who signed a bill of exceptions, which was assigned for error here.

The circumstances of the parties, the embarrassments of *Campbell*, in part growing out of this contract with the *College*, and the affluence of *Colhoun* were relied upon by the defendants to fortify the defence on this point, and much evidence was given, which it is not necessary to the proper understanding of the case here to detail.

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*Parker Campbell* survived Mr. *Colhoun* some years, and died in July 1824; and this suit was brought on the 6th February, 1827.

The plaintiff's counsel (among other points,) requested the court to charge the jury. "That *John Colhoun's* administrators and estate are liable to *Parker Campbell's* executors for the one half of all money he may have paid on the contract with the *Washington Academy*; and are not confined, if otherwise entitled to recover, to the excess of payment beyond the half that *Parker Campbell* was bound to pay."

On this point the court charged the jury—"That three per cent. per annum became due, and was payable semi-annually, and after eight years six per cent. The *College* had a right to demand this sum at the periods stipulated. If there was a contract between Messrs. *Campbell* and *Colhoun*, by which each had an equal interest, and each was bound to make equal payments under the contract with the *College*; then, any sum paid from time to time in discharge of the accruing interest, by any one of the parties, beyond his proportion, was paid for the other, and the law would raise a promise to repay, but any sum paid by either, beyond the interest, that is in discharge of the principal, would be a payment on his own account, provided such payment did not exceed his proportion of the purchase money; and being a payment on his own account of his own debt, the law would raise no promise on the part of the other to repay it."

This part of the charge was assigned for error here.

The court, in answer to a point put by the defendant's counsel, as to the statute of limitations, which was relied on in defence; charged the jury, that "if Messrs *Campbell* and *Colhoun* had a joint interest in the purchase, and Mr. *Campbell* acted as the agent, and in trust for Mr. *Colhoun*, and went on from time to time paying his money on the contract, as contended by the plaintiffs, in contemplation of carrying the contract into effect, and, in this way, paid more than his proportion of the the instalments annually due, being under a legal obligation to do so, he would also have the implied assent of Mr. *Colhoun*." "The contract was a continuing one—the trust was to exist throughout the whole concern, and when the contract should be consummated, the separate rights of each would be ascertained. While it continued, each might act for the other—intermediate settlements were not contemplated. It would, therefore, under such circumstances, be in fraud of the statute of limitations to account each payment a separate act, and liable to its operation.

The verdict was for the defendants.

*Washington*, for the plaintiff in error.

1st. As to the bill of exceptions.—The six letters dated after 1814, (admitted in evidence,) showed no connection with, or allu-

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sion to the contract in question, and were relied on to show that it was abandoned. They were wholly irrelevant, and testimony of a dangerous character. It is put in the power of a party to select such as suited his own purpose, and suppress the residue of the correspondence; the whole of which he cannot be forced to exhibit, and any part of which he may destroy.

2d. As to the charge of the court.—*Colhoun* was not a contracting party with the *College*, and to it he never owed any liability; his liability was to *Campbell*.

If the court below were right, then *Campbell* could not have called on *Colhoun* to pay, till he had paid his full half, which, as the principal was not all to be paid for seventeen years, *Campbell* could not have recourse to *Colhoun* until that time. This view is inconsistent with the letters of *Colhoun*, and the nature of the transaction. He recognized his liability to pay his portion of the money as the contract progressed.

But suppose one half of the purchase money to have been paid, and the *College* had taken back but half the land; *Colhoun* could not recover any part of the land, because, the remedy must be reciprocal; and if *Campbell* cannot sue when he has paid but the one half of the purchase money, *Colhoun* could not, in the case supposed, recover any portion of the land. Here, the contract with the *College* was rescinded, and the liability of the parties to each other for money paid on the contract, while it subsisted, attached.

In the case of co-sureties, the one can only recover for what he pays beyond his proportion, because if the payment be less, the liability of the co-surety remains; but if the principal contract is at an end, then the surety can call on his co-surety for contribution, although he has paid less than his proportion of the entire sum of the contract.

G. *Chambers* and *McCulloch* for the defendants in error.

1st. The case on the part of the plaintiff's was exceedingly obscure. The precise terms and nature of the contract upon which they relied, did not appear. They inferred its existence, by inference from the expressions used in letters prior to the year 1814. The defendants, admitting that a contract of some sort, in reference to these *College* lands, had once existed, relied on many circumstances to establish the fact that it had been abandoned. The letters, dated after that period, from Mr. *Campbell* to Mr. *Colhoun*, proved that a correspondence had been continued between them, and that Mr. *Campbell* did not, in it, refer to this contract, and insist on the liability of Mr. *Colhoun* to him: although the contract then become more interesting: as the rate of interest then increased, and Mr. *Campbell* after that time became embarrassed. In a case of circumstances, which, on the part of the plaintiff, as well on

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the part of the defendant this was; the existence of this correspondence, and the silence of Mr. Campbell, as regards the contract were powerful circumstances to show that the contract no longer subsisted. But if these letters proved any thing, however slight, in reference to the defence, it was proper to permit them to go to the jury; particularly as both parties were dead, and the transaction involved was an ancient one. It was for the jury to say if any letters had been withheld.

2d. The jury gave a general verdict for the defendants, which could only be on the ground that the contract alleged, had been rescinded.

And, if the court did err in their charge to the jury, on this point, it was without any prejudice to the plaintiff, as the jury decided on another ground.

This is not the case where the court cannot ascertain the point upon which the verdict was given; here it may be readily separated and distinctly ascertained.

The nature of the contract was wholly a matter of conjecture.

If it were between Campbell and Colhoun, after Campbell bought, it was a sale to Colhoun by Campbell, and should have been declared upon by the plaintiff as such. And in case the land had been lost by the default of Colhoun, if Campbell had paid his full proportion of the purchase money, his remedy would have been on the specific contract, and a general action of assumpsit for money paid to the use of Colhoun, is not the remedy.

The action here is founded on the idea that the purchase had been made by Campbell for both.

This difficulty as to the nature of the contract lays at the door of the plaintiff, who lay by so long without attempting to enforce any liability on the defendant, and although, as respects a creditor it is enough to know, and establish a partnership by reputation; yet as between the parties, on a question of liability, one partner must establish the contract distinctly.

The charge of the court below was, that the plaintiff might call on the defendant for contribution for a payment of more than his proportion of the interest.

This would stop in 1813, when the principal was due; and any payment by the plaintiff, after that, was less than his proportion of principal and interest. This he was bound to pay, and he could therefore cast no liability on the defendant by paying this.

As between partners and co-sureties the law is well settled. One partner or surety cannot sustain an action against his co-partner or co-surety for the payment of his proportion of the debt. It is for the excess beyond this only that a right of action exists. *Gox*. 113-14. 1 *Madox Chan.* 191. *Ex parte Crisp*. 1 *Atkins* 134-5. *Sowyer v. Lyon*, 10 *John. R.* 32.

(John S. Brady, Samuel Lyon and Samuel Murdock, executors of Parker Campbell, deceased, v. Andrew Colhoun, and James Colhoun, administrators of John Colhoun, deceased.)

But here, the contract was not rescinded by the recoveries in the ejectments instituted by the *College*; nor are the defendants affected by any negotiation with the *College*, which is without their privity. The vendor, who obtains possession by ejectment for default of his vendee, does not hold as of his former estate, nor is the contract rescinded by such recovery. *Martin v. Youst*, 3 *Serg. & Rawle*, 432. *Marlin v. Willing*, 7 *Serg. & Rawle*, 297. The vendor holds possession as a security in such case, and as to the vendee, chancery relieves against the lapse of time, especially where a large part of the purchase money has been paid. The question as to *what* time the vendee shall be allowed, after the vendor has taken possession on his default, to redeem, has not been settled; but it is clear that in such case the contract is not rescinded.

*Crawford*, in reply.—The contract between *Colhoun* and *Campbell*, upon which we based the liability of the former, was involved in no doubt or obscurity. It was fully made out by the letters of *Mr. Colhoun*, which the plaintiff's gave in evidence, and which, containing admissions against his interest, are the strongest possible evidence on this point.

The letters which did not refer to this transaction, but to the affairs of the family, ought not to have been received in evidence.

The presumption of abandonment of the contract would have been as well sustained by the fact of no letters being given in evidence, as by these letters. It is because they contain *no* evidence that they were received. The law of evidence would not permit conversations between parties, in which nothing was said about the transaction in issue to be proved.

The evidence here was of no better character: and their introduction brought before the jury little extrinsic circumstances, which ought not to have reached the jury at all.

It is not only liable to these objections, but those already urged on account of the danger of tolerating this kind of evidence.

2d. It is against all equity, that *Campbell*, in a case of this sort, should not have a right to recover a proportion of any sum which he had paid. If it be conceded that he was entitled to recover for interest paid, as the court below charged the jury, on the same principle, he should be entitled for his payment of principal.

*Campbell* was the only party known to the *College* in the contract, so that one half of every dollar paid by him was for the use of *Colhoun*, who was thus unknown to the vendor.

Where one of two sureties pays the one third of the whole debt, and the principal pays the balance, the surety could most certainly call on his co-surety for contribution. So if one of two partners, pays one fourth of a debt due by the firm, upon a compromise of

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the whole demand, it is equal clear that he may have contribution from his co-partner. It is only where the *liability* remains, that the surety, or partner cannot be reimbursed for any payment less than the half of the debt: and when the books speak of half of the whole debt, they mean the half of the whole debt *demandable*. The case in 10 *John*. went upon a different principle. There the liability remained, and the defendant's land was subjected to it. Now, by the recovery of the land in ejectment by the *College*, all the right of the *College* to call on *Campbell* or *Colhoun*, is gone: although it be true that the vendor in such case holds as a trustee for the vendee, who *may* redeem.

It is impossible to ascertain on what point the jury found, or that they were uninfluenced in their finding by the charge of the court on this point. When the court told the jury that as to the principal we had no right to recover, it may have induced the jury to believe that we had no right to recover on account of interest: and the court will not sustain the judgment upon a conjecture that the jury found on another point, because by possibility they may have so found.

The opinion of the court was delivered by

GIBSON, C. J.—The evidence to charge the defendants consisted of a series of letters written by *Colhoun*; from which it would seem, he had been let into some sort of participation in *Campbell's* purchase. All allusion to the subject, however, having been discontinued on the part of *Colhoun* for a period of thirteen years, the defendants offered as additional evidence of the rescision of their agreement, six letters written by *Campbell* in a period of as many years, in which, also, there is no allusion to the subject, although it had, at one time been a leading topic of their correspondence. We cannot admit that these letters were irrelevant, because the writer was silent on the subject of the agreement: on the contrary, they were relevant for that very reason. In connexion with the lapse of thirteen years of silence on the part of *Colhoun*, the silence of *Campbell* for at least six, was a powerful circumstance; and were the objection of irrelevancy to prevail here, it must necessarily prevent a party, under any circumstances, from being affected by silence, which, though often more significant than words, has no positive allusion to any thing. Neither do we admit the force attempted to be given to the objection that the defendants may have suppressed all but such parts of the correspondence as suited their purpose. As to that, the plaintiffs had a right to examine them on oath; and this, I understand, though tendered, was declined.

In respect to the charge, it seems to me that both parties put

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to the court as a conclusion of law, what was properly a matter for the jury—the supposed liability of the defendants to contribution for the payments of *Campbell* whether more or less than his proportional part. It is obvious that this depended, in the first instance, on whether the parties had agreed to apportion the profit or loss; which is of the essence of PARTNERSHIP. Although it be by no means common, there may be a partnership to trade in land; and it may, as in any other case, be limited to purchasing only, the profit or loss being divisible as stock; but this relation does not necessarily, or even naturally, arise from the bare circumstance of the parties having purchased jointly. The existence of partnership as deducible from facts and circumstances, is not for the court but the jury; and in submitting propositions supposed to result from the evidence as conclusions of law, the plaintiffs abandoned the notion of a partnership having existed in fact, and went to the court on the supposed liability of the defendants as representing a joint purchaser. Then to put the case as favourably to them in point of fact as it will bear, we must suppose the parties had agreed to stand, as between themselves, in the relation of joint purchasers, each separately paying his share of the price, without being bound to bear an equal share of the loss; and in this aspect it is clear; they would not be entitled to the remedies, nor subject to the responsibilities of partners. The purchase was at a credit of eight years, with interest, at three per cent; after which, the principal was to be paid at three, six and nine years, reserving six per cent. on unpaid balances. *Colhoun* was taken into the purchase as if, it may be supposed, he had been originally concerned; and if *Campbell* paid, as there is reason to believe he did, all the interest as it became due, he paid a moiety of it to the use of *Colhoun*, for which a right of action instantly accrued, but which was subsequently barred by the statute of limitations. Laying partnership out of view, as the parties themselves have though fit to do, there was no agreement for advances, nor any thing which looked to the settlement of a final account. It even was not part of the agreement that they should contribute to a common fund. The advances of *Campbell* were in pursuance of his original liability for the whole, and they became demandable, not by virtue of any previous contract with *Colhoun*, but the contract which arose from the fact of payment, by implication of law. There was nothing to prevent *Campbell* from maintaining an action for a moiety of each payment the instant it was made; and I therefore cannot concur in the opinion expressed at the trial, that the statute was not a bar. The same obstacle would present itself to a recovery of the principal; were it established that *Campbell*, paid more than his share. He made various payments and the



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jury were instructed that he had paid nothing to *Colhoun's* use, it being taken for granted that he had at no time paid more than his proportion of the instalment last due. Now the fact would depend on the manner of the appropriation, it being abundantly clear that a debtor may apply his payments to any particular debt or account, at his election; and had the plaintiffs desired the court to put the cause to the jury on the fact of *Campbell's* having paid any particular instalment in full, it would have been error to refuse it. They, however, thought fit to put the whole to the court as a matter of law, and it seems to me, therefore, that the principle assumed being right, we cannot say there was error in the application of it.

There is, however, another ingredient beside the statute of limitations, by which a defect in this part of the case would be cured. It appears from the whole matter, that the jury went on a distinct ground of fact, THE RECISION OF THE CONTRACT. On no other ground could a verdict have passed for the defendants, as any application of the rule laid down, would have produced a balance to the plaintiffs. The statute of limitations being put out of the way, (whether erroneously or not, is at present immaterial,) the plaintiffs would have clearly been entitled to a moiety of the moneys paid to keep down the interest. It being clear then, that the jury found on a distinct question of fact, which was decisive of the cause, it would be oppressive to reverse for a misdirection in law, if such there were, which did not relate to it. A court of error invariably disregards whatever has not contributed to the event; so that had there been misdirection in other parts of the case, it would have been insufficient to avoid the consequences of the verdict.

Judgment affirmed.

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JOHN MOORE *against* JOHN M'BRIDE, Administrator of  
ROBERT M'BRIDE, deceased.

IN ERROR.

In an action commenced by *capias*, a short minute of a recognizance of special bail, taken by the clerk of a prothonotary, in this form, "*R. M. held in \$200 cogn. coram E. L. for J. H. Proth'y,*" held to be sufficient.

Writ of error to the court of common pleas of Cumberland county.

This was a *scire facias* upon a recognizance of special bail, to which the defendant pleaded "*nul tiel record,*" and the court

(*John Moore v. John M'Bride, administrator of Robert M'Bride, deceased.*)

below gave judgment for the defendant, in which the plaintiff now alleged error.

The following is the entry of the recognizance on which this *scire facias* was issued.

John Moore	}	No. 28, August term, 1824.
v.		<i>Capias</i> debt on note under seal not exceed-
James A. Mitchell.	}	ing \$200. Bail in \$200

*Robert M'Bride held in \$200 cogn. coram Edward Leonard, for John P. Helfenstien, Proth'y. 5 May, 1824. C. C. and special bail entered. (Sh'ff \$2 12.)*

In this suit the plaintiff obtained judgment upon report of arbitrators for one hundred and sixty-seven dollars and sixty-five cents; to recover which, (after the proper executions,) this *scire facias* was issued.

*Penrose* for the plaintiff in error.

A short minute of a recognizance is sufficient, provided it indicate the nature of the recognizance, so that the officer may make it out at large when it is required. *Commonwealth v. Emery*, 2 Bin. 431. A short note, such as "*A. B. in £40 to appear, &c.*," was held to be sufficient. 4 *Burns' Justice*, 84, 18th edition. In this case there could be no other recognizance but that of special bail. This is abundantly indicated by the docket entries: and if necessary, the court would consider the words, "C. C. and special bail," alleged to be the return of the sheriff, as part of the recognizance in order to sustain the proceeding. He also cited *Welsh et al v. Vanbebbber et al*, 4 *Yeates* 559, and 1 *Barnes*, 4.

*Alexander*, for the defendant in error.

It is admitted that a short minute of a recognizance is sufficient, provided it shew the amount, and the condition upon which the recognizer is bound.

But this recognizance is without the most important feature of a recognizance, a condition: nor is it at all indicated by any part of the minute. It does not appear whether the undertaking was absolute or conditional; and it follows that there is nothing from which the officer can make it into form.

The *scire facias* set forth a recognizance of special bail, this minute does not show such a recognizance, for it does not indicate in any way the condition of such recognizance.

The *Commonwealth v. Emery* cited on the other side is an authority for us. It is there decided, that the short minute of the recognizance should substantially shew the condition of the recognizance.

The words, "C. C. and special bail," are manifestly the return of the sheriff and form no part of the recognizance.

The opinion of the court was delivered by

HUSRON. J.—We readily forget what we once learned, and nothing is sooner forgotten than forms of proceedings in foreign

(John Moore v. John M'Bride administrator of Robert M'Bride, deceased.) courts, which we have scarcely learned, because we supposed them not to be important here. Every lawyer has looked into *Compton* or *Sellon*, or some of those books of practice which so properly gave the precise forms of entry in the several stages of the cause. *Tidd's Practice*, in two volumes, in which we have no forms, has, in a great degree superceded the former authors. In many respects the short minutes, in this state, are not made precisely in the words used in England, or in other states. I do not admit, however, that in this respect the difference is against us. In the science of pleading, we are, perhaps, generally much inferior; and our short notes of pleas, replication and issues, have brought obliquy on our practice; and that far beyond what the truth required. The worst of it is, that this reproach in some mouths takes a wider range, and extends to every thing good or bad, and this pretty much in proportion as the censurer is unqualified to judge. I speak generally, with no reference to this cause, for there has been less occasion for the observation here, than we meet every day.

For the benefit of those who have forgotten the forms in other countries, I will transcribe from *Sellon* the form of entering special bail in the King's Bench and Common Pleas, in England. 1 *Sellon's Practice*, 139.

In the *King's Bench* it is taken before the judge's clerk, although when filed it is a record. After the words of the recognizance are repeated to the bail, and he agrees to become bound, the bail piece is made out in this form:

*Easter Term*, in the 32d year of the reign of George III. *Stormont and Way*.

Middlesex, } A. B. is delivered to bail to wit, } on a *cepi corpus*, to

C. D. of C. London, mercer, and E. F. of N. London, hatter.

J. S. attorney.  
Sworn to  
100/.

At the suit of  
J. K.

4th May, 1792.

In the *Common Pleas* the filazer attends with his book, and names of parties, &c. and a short entry is made to be drawn into form. If the filazer cannot attend, a bail piece is made in this form:

*In the Common Pleas.*

*Easter Term*, 32d of George III.

Middlesex, to wit, *Capias* against A. B. late of W. yeoman, at the suit of C. D. for 200/, upon promises returnable, &c.

Affidavit for  
100/.

Taken and } Bail are E. F. of C. acknowledged } London, hatter, and G. H. of London, mercer. Defendant bound in 200/. Each of bail in 50/.

If the bail be not excepted to, this bail piece is carried to the proper office, in the respective courts, no other entry as bail, or of the terms of the recognizance, is ever made. It is drawn into form.

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if the record be wanted, or declared on, as if entered at full length, if necessary to sue it:

In every country and age where law is practised, abbreviations, short notes, and technical words are used in cases of daily or hourly occurrence, to save labour. When properly understood, they answer every purpose of setting every thing out at large. These short notes or abbreviations vary in different states; nay here in different courts; but if admitted at all, one is as good as another, provided it indicates with certainty what was done. Here there was but one kind of bail known to the law, in that stage of the cause, and but one form of recognizance which could be taken. It cannot be pretended that any difference of opinion can exist as to what the bail engaged. The special bail is named, and the sum in which he is bound; and this is subjoined to the statement of the suit, on the docket, the date is added, and the name of the prothonotary's clerk; it is impossible that there can be any mistake as to any one matter essential in the case.

The form used in this case is at least as certain as that used in *England*; this is said for those who think nothing right but what is English: it has every requisite. Once admit that a short note of the entry of the bail is good, and that used here is as good as any other; and any other, indicating all that this does, is as good as this.

Something was said about its being taken by the prothonotary's clerk, and not by the prothonotary himself. This court has given an opinion on that more than once, lately. I would just observe that in *England*, the recognizance, when filed, is a lien on land, as much as a judgment, and always must be taken before a judge; in point of *fact* it is always taken by the *judge's clerk*.

Judgment reversed, and judgment entered for the plaintiff in error.

**GEORGE HIMES *against* GEORGE JACOBS, ROBERT HUSTON, GEORGE CRONISTER and ANTHONY DEARDORFF.**

**IN ERROR.**

Where suit is brought against the personal representatives of a deceased debtor, with notice to the tenants in possession of the land upon which the debt is alleged to be a lien, and the tenants appear, and make defence, they are concluded by the verdict and judgment; although they may not, *in fact* have put in issue the question of lien; and in an ejectment brought by a sheriff's vendee under that judgment against such terre-tenants, they will not be permitted to contravert the lien of such debt.

It is a rule of pleading that whatever is not contested, at the proper time, is conceded.

In Pennsylvania, where lands are assets for the payment of debts; it is most just to afford the terre-tenant, who is the party to be affected, an opportunity to contest the debt—and the plaintiff may do so.

Even where the terre-tenants have been called upon prematurely, still, if they avail themselves of the occasion, and have a fair opportunity to make a full defence, they are concluded.

WRIT of error to the court of common pleas of Adams county.

The case was an action of ejectment, brought by the plaintiff in error, who was plaintiff below, to recover a tract of land; and both plaintiff and defendant made title under *John Ross*, deceased, in whom it was admitted it was originally vested.

The plaintiff claimed by virtue of a sheriff's deed, which was made to him upon a judgment obtained at the suit of *Isaac Boyers* and *Abraham Boyers*, against *Sample Ross* and *Samuel Ross*, executors of *John Ross*, deceased, with notice to the tenants in possession.

The proceedings in that suit were material to his title, and so far as they are so, are here given at length.

*Docket entry.*

Isaac Boyer, and Abraham Boyer,

v.

*Sample Ross* and *Samuel Ross*, executors of the testament and last will of *John Ross*, deceased, with notice to *Anthony Deardorff*, *David Ross*, and others, tenants in possession of the real estate of said *John Ross*, deceased.

No. 135, April term, 1822.

Summons debt £1510 05.

Sheriff Gilbert returns served on *Anthony Deardorff*, *David Ross*, &c. Narr. filed. Defendant pleads payment, with leave, &c. Replication *non solvit*. Issue, &c.

*Stevens* and *Sweney*, for plaintiffs. *McConoughy*, for terre-tenants.

April 28th, 1826, *Samuel Ross*, one of the defendants, agrees that judgment be entered against the executors and devisees in this suit.

JUDGMENT according to agreement.

(George Himes v. George Jacobs, Robert Huston, George Cronister and Anthony Deardorff.)

And now, 26th August, 1826, verdict for the plaintiff for fifteen hundred and ten pounds and five shillings, to be released on payment of three hundred and seventy-one dollars and fifty-four cents.—JUDGMENT.

Declaration, filed April term, 1823.

ADAMS COUNTY, SS.—*Sample Ross* and *Samuel Ross*, both late of the county aforesaid, yeomen, executors of the last will and testament of *John Ross*, late of the county aforesaid deceased, were summoned to answer *Abraham Boyer* and *Isaac Boyer* of a plea that they render to them the sum of one thousand five hundred and ten pounds five shillings, equal to four thousand and twenty-seven dollars and thirty-three cents, lawful money of Pennsylvania, which to them they owe and unjustly detain, &c.

And whereupon, the said *Abraham* and *Isaac*, by *George Sweeney*, their attorney, complain that, whereas the said *John Ross*, in his life time, that is to say, on the fifteenth day of June, in the year of our Lord one thousand seven hundred and ninety, by his certain writing obligatory, to the court here shown, acknowledged himself to be bound unto the said *Abraham* and *Isaac*, in the aforesaid sum of one thousand five hundred and ten pounds, five shillings, to be paid to the said *Abraham* and *Isaac*, when he the said *John* should be thereunto afterwards requested; and whereas the said *John*, at and immediately before the signing and sealing of the aforesaid writing obligatory, was seized in his demesne as of fee, of and in a certain tract of land, situate in Franklin township, in the then county of York, now Adams, and state of Pennsylvania, adjoining lands of *William Shakely* and *Robert Shakely*, the heirs of *Samuel Russell*, deceased, the heirs of *Moses Jenkins*, deceased, and others. And whereas the said *John*, afterwards, to wit, on the sixth day of January, in the year of our Lord one thousand eight hundred and five, made his last will and testament in writing, and constituted the said *Sample Ross* and *Samuel Ross*, the executors thereof; which said last will and testament was duly proved and recorded, according to law; by which said last will and testament, the said *John Ross* devised the tract of land aforesaid to the said *Sample Ross* and *Samuel Ross*, to be sold, and the proceeds thereof to be applied to the payment of his debts, and certain legacies in the said will and testament specified, and died seized thereof—which said tract of land was not sold by the said *Sample Ross* and *Samuel Ross*, agreeably to the provisions of the said last will and testament, but still remains subject to the lien of the debts of the said *John Ross*; and subject to the payment of the said sum of one thousand five hundred and ten pounds five shillings, mentioned in the aforesaid writing obligatory, to the said *Abraham Boyer* and *Isaac Boyer*. Nevertheless, the said *John Ross*, in his life time, and the said *Sample Ross* and *Samuel Ross*, since the death of the said *John Ross*,

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although often requested, have not paid the aforesaid sum of one thousand five hundred and ten pounds, five shillings, to the said *Abraham Boyer* and *Isaac Boyer*, but have hitherto refused, and still do refuse, to pay the same to them; to the damage of the said *Abraham Boyer* and *Isaac Boyer*, five thousand dollars, and therefore they bring this suit, &c.

Upon the judgment so obtained, in this action, the land in question was levied and sold to the plaintiff; and on the 26th May, 1827, a sheriff's deed was made to him.

The defendant, *Anthony Deardorff*, claimed title under a judgment obtained at the suit of *Tobias Kepner*, guardian of *Bittinger*, against *Samuel Ross*, and another, on the 10th of April, 1820, upon which the land was sold, on the 25th of November, 1822, to the defendant; and on the 16th January, 1823, a sheriff's deed was made to him.

*Samuel Ross* was one of the five sons and daughters of *John Ross*, deceased, and one of the executors named in his will.

In the will of *John Ross*, which was proved on the 6th April, 1805, he directed that his real estate, of which the land in dispute was a part, should be sold by his executors, that they should pay his debts, and distribute the residue of the proceeds among his children equally.

On the 26th of February, 1813, *William Baxter*, who was married to a daughter of *John Ross*, deceased, and his wife, and *John Ross*, the son, released to *Samuel Ross* their respective interests under the will.

In the same year, *David Ross* and *Samuel* made a division of the land which had been of *John Ross*; and *David* agreed to take the portion divided off to him, on account of his interest under his father's will. After the division, which was by parole and in pais, *David* built a tenant house, on his part, and enjoyed it separately.

To show that the interest of *Samuel Ross*, the remaining legatee, under the will of *John Ross*, had been also vested in *Samuel Ross*, the defendant gave in evidence a judgment which had been obtained against *Samuel Ross*, on the 15th August, 1808, at the suit of *W. Hosack*, administrator of *Brown*; and a levy, and judicial sale of the interest of *Samuel* in the land of his father, to *Samuel Ross*; and a sheriff's deed of the same to *Samuel*, dated the 3d day of October, 1809. *Samuel* had improved the land, and the houses built upon it; and expended considerable sums of money in these improvements, after he obtained the releases of his brothers and sisters.

In answer to points put by the counsel of the plaintiff, the court below charged the jury—that by the act of the 4th, April, 1797, no debt, unless secured by mortgage, judgment, recognizance, or other record, shall remain a lien on the lands of decedents for a

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longer period than seven years from the decease, unless action be commenced within that period; or, if such debt be not due within seven years, unless a written statement of the debt be filed of record in the prothonotary's office within such period.

That *John Ross* died before the 6th of April, 1805, and that no suit was brought upon the bond from *John Ross* to *Isaac* and *Abraham Boyer*, or any description of it filed in the prothonotary's office, within seven years after the death of *John Ross*; and that consequently as against a *bona fide* purchaser, which *Anthony Deardorff* was, the lien of that debt was gone before suit was brought.

And that *Anthony Deardorff* was not estopped by the pleadings and proceedings in the suit, which was brought on that bond, in 1823, from denying the existence of that lien, and controverting its effect in this action.

The errors assigned were to the charge of the court on these two points.

*Penrose* and *Stevens* for the plaintiff in error,

1st. Contended that under the will of *John Ross*, *James Ross* and *Samuel Ross*, the executors become invested with an estate in his lands devised in trust for the uses of the will, and that the power to sell never having been executed by them, and the entire title never having been acquired from all the cestique trusts the entire estate had never been so vested in them as to warrant the application of the limitation of the act of 1797, which was made for the benefit of the *bona fide* purchaser. Where trustees have an estate vested in them, a purchase by them of part of the interest of cestique trust does not vest in them such an interest in the trust fund as that a sale on a judgment, obtained against them, would transfer the title clear of the trust.

Here one of the trusts of the will was the payment of the debts of the testator, of which the debt under which the plaintiff claimed was one. To have the effect contended for, the purchase by the trustee must be of the entire interest. In case of a partial purchase the trust remains, and the purchaser at sheriff's sale, under the judgment against the trustee, would take subject to the trust.

It is obvious that nothing less than an agreement of the parties in interest could extinguish the trust; a partial agreement could not have this effect.

Here the lapse of time did not run against the trust, and *Deardorff* comes in with full notice. He claims under a judgment against *Samuel Ross*; and one of the muniments of his title is the will of *John Ross*, which gave him notice of the trust, and which imposed upon the executors the duty of paying the debts of the testator. The title which *Deardorff* bought was an equitable title, and he must



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take it with all the circumstances of the equity: and a paramount incumbrancer is not defeated.

Any other doctrine would establish a rambling and licentious equity, to depend on the circumstances of each case.

The judgment against *Samuel Ross*, and the sale upon it of his interest in the land devised to *Samuel Ross*, vested no title in *Samuel*.

He was a legatee under the will of *John Ross*, and took no interest in the land upon which that legacy was charged, which was the subject of a judicial sale. *Allison Ex'r of Henderson, v. Wilson's Ex'rs.* 13 Serg. & Rawle, 330.

2d. But *Deardorff* has had his day of grace, and it has come to judgment. In the suit brought on the bond of *Boyer and Boyer* he appeared and made defence. In the declaration the plaintiff set forth certain facts, among them those which constituted a lien. The plaintiff in that case had a right to call in the terre-tenants, and save the expense of a subsequent investigation.

It is not competent for a party after trial and judgment, to allege that he might have put in another plea which would have answered his purpose better. If he *might* have put in the plea that is enough; he is concluded by the trial and judgment as to every fact alleged, and not denied by him. Nor does it lay in the mouth of the defendant to say, that there was no trial on the point, as to the lien of the debt, alleged by the plaintiffs in that suit. It was a matter of no importance to the terre-tenants whether the debt was due by *John Ross*; the lien of the debt on their land was the only question of interest to them. 1 Phil. E. 140. 243. 288.

In ejectment the irregularity of the proceedings in a *scire facias* sur mortgage, as that the judgment was entered on one *nihil*, cannot be inquired into. *Allison v. Rankin*, 7 Serg. & Rawle, 269. So in a *scire facias* against an heir and terre-tenant, what might have been pleaded is concluded by the verdict and judgment. *Coyle et als v. Reynold's Ex'r* 7 Serg. & Rawle, 328. *White v. Ward et al*, 9 John. R. 232. *Nace et al, v. Hollenbach*, 1 Serg. & Rawle, 548. *Bender v. Fromberger*, 4 Dall, 436.

The mode of proceeding adopted by the plaintiffs in the suit upon the bond was perfectly regular. They first took judgment against the defendants, the executors of *John Ross*, and then went to trial with the terre-tenants.

Such is the mode in the case of a *scire facias* on a mortgage or recognizance: judgment is taken against the cognizers or mortgagors, and then the plaintiff goes to trial as to the terre-tenants.

*Carothers*, for the defendants in error.

1st. *Samuel Ross* was executor, and also seized of the legal estate in the land in question, under the will of his father. The

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interest of the legatees become vested in him by purchase, and the execution of the power, under the will, was thereby dispensed with, and the devise became absolute. *The court here told Mr. Carothers that he need not labour this point.*

2d. As to the lien of the debt to *Boyer* and *Boyer*, it was gone. The debt had stood from 1793 to 1823, and if there was a lien, as against *Samuel Ross*, it was discharged by the sheriff sale, under which *Deardorff* became the owner of the land. *Commonwealth for the use of Guernsey v. Alexander*, 14 *Serg. & Rawle*, 257. *McLanahan v. McLanahan*, ante. p. 96.

It is not conceded that *Deardorff* had notice of the debt, but in *Bombay v. Boyer*, 14 *Serg. & Rawle*, 253, it was decided that express notice of a judgment does not avoid the limitation of its lien to five years. This principle is equally applicable to the act of 1797, as to the lien of debts of decedents.

But if actual notice had been given by *Boyer*, it would not be enough, for the act of assembly requires the notice to be of record: and none other will suffice to preserve the lien of the debt under that act.

The lien was clearly gone, nor is there any virtue in the proceedings in the suit upon the debt to preserve it. That proceeding was an anomaly. In Pennsylvania there is no such thing as an action of debt with a notice to the tenants of land, against which a lien is asserted. In England the heir is not bound unless the ancestor bound him, but in Pennsylvania lands are subject to the payment of debts, and are bound in the hands of the heir, independent of any contract to that effect. It is not in such case affected directly but collaterally.

The principles, therefore, which prevail in England on this subject, are wholly inapplicable here. The form of action is without any precedent, and no good can result from adopting it.

The whole proceeding on this point was a nullity, and altogether immaterial.

A party is never concluded by an immaterial averment or issue.

An estoppel must be clearly shewn. This record does not show it clearly. The plea put in was "*payment*," suppose it to have been put in by *Deardorff*, it would not admit the trial of the question of lien. It would not in the case of a *scire facias* on a recognizance or mortgage. In *Magauran v. Patterson*, 6 *Serg. & Rawle*, 278. it is said a verdict is conclusive as to the fact found, or passed upon. Where it is a man's duty to plead he may be bound. But the application of this principle to this case would be unjust.

The record of a proceeding, between landlord and tenant, is not conclusive in ejectment. *Galbraith v. Black*, 4 *Serg. & Rawle*, 212. *Hess v. Heeble*, *ibid.* 246.

The action was on a bond, with a collateral condition to perform

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covenants, and a *general judgment* was confessed by one of two executors.

The amount of the damages were not ascertained, and until that was done, the terre-tenants were not bound to answer. A jury in court, or inquest on a writ, was the proper tribunal for this inquiry. The jury then tried nothing but this preliminary issue, to which the terre-tenants, could not be parties. *Reigart et al v. Ellmaker*, 6 *Serg. & Rawle*, 45-6. *Kean v. Ellmaker*, 7 *Serg. & Rawle*, 1-3.

The verdict is general, and if it were between the plaintiffs and terre-tenants, it would bind them personally, which cannot be.

The plea put in was "by the defendant," and not by the *terre-tenant*, and he can in no way be affected by it.

The opinion of the court was delivered by

GIBSON, C. J.—Land being assets for payment of debts, may be seized in execution in the hands of the heir, on a judgment exclusively against the executor who has no occasion to do more than discharge himself of eventual liability in respect of the personal assets; and, therefore, nothing is more common than to pray judgment of the land after the executor has discharged himself on *plene administravit*. Surely it would be more just to afford the terre-tenant who is the party to be affected, an opportunity to contest the debt; and it has never been supposed that the plaintiff may not do so. Where it is doubtful whether the land has not been discharged in the hands of a purchaser, the reason for affording him an opportunity to shew the fact is not so urgent, because a judgment against the executor, being conclusive only of the existence of the debt; the question of lien may, with equal advantage, be tried in an ejectment by the sheriff's vendee. Still, where the terre-tenant has actually appeared and had an opportunity to make a full defence, even though he may not have availed himself of it, he is concluded to every intent. In *Heller v. Jones*, 4 *Bin.* 61, a younger judgment creditor who had appeared to a *scire facias* and given notice that he would insist on collusion in the concoction of the original judgment, but had afterwards taken no part at the trial, was precluded from controverting the fairness of the judgment in an ejectment by a purchaser under it: and this on the ground that he had in fact had an opportunity to try the question and neglected it. The principle of that case is in accordance with a rule, not merely of pleading, but good sense, that whatever is not contested at the proper time is conceded. Even had the terre-tenants here been called in prematurely, still they availed themselves of the occasion, and had as fair an opportunity to make a full defence, as if the proper time to do so had not been anticipated. They came in to shew that the land was not debtor; and this they were competent to do, either by disproving the debt or

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nullifying its lien; each of which was open to them as an available ground of defence, and there is no reason why they should be suffered to use but one and reserve the other. That is the naked point, here, as their right to do so, is evident from the proceedings in the original action. The plaintiffs brought debt on bond against the executors of the obligee, with notice to terre-tenants who had purchased from the heir, and claimed to hold the land discharged. The executors confessed judgment; but the terre-tenants went to trial on the plea of payment, and it was found against them. Now I am not going to say what may be given in evidence under that plea. The question of lien was tried or it was not. If it was tried, it will not be pretended that it ought to be tried over again; and if it *might* have been tried under a proper plea and was not, then the case is within the principle of *Heller v. Jones*, and the terre-tenants are concluded just as if the fact had been expressly found against them. That case, however, is by no means so strong in circumstances. There the younger judgment creditor had only given notice of an intended defence, without proceeding further; here the terre-tenants actually went to trial, and were necessarily bound to bring forward their whole defence: so that notwithstanding the lien was clearly gone, yet having missed the opportunity to shew it, we are of opinion they are concluded.

HUSTON, J. and SMITH, J. dissented.

Judgment reversed and *venire de novo* awarded.



**CASES**  
**IN**  
**THE SUPREME COURT**  
**OF**  
**PENNSYLVANIA.**

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LANCASTER DISTRICT—DECEMBER ADJOURNED COURT, 1829

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**The BANK OF PENNSYLVANIA** *against* **JACOB M. HAL-**  
**DEMAN** and **RICHARD T. JACOBS**, *Administrators de bonis*  
*non*, with the will annexed, of **SAMUEL JACOBS**, deceased.

**IN ERROR.**

Upon the allegation of forgery, it is not necessary to produce, as witnesses, all the persons in whose possession the forged paper had been, in order to identify it—its identity is a matter of fact for the jury.

A comparison of hand-writing, is admissible in evidence in civil cases in corroboration of a belief of a witness, founded upon actual knowledge.

The testimony of an *expert*, who speaks alone from his knowledge and skill in hand-writing, is not competent to establish a forgery.

When the court of Common Pleas, erroneously permit evidence to be given to the jury, no such evidence being afterwards given, this court will not reverse the judgment.

If an executor, upon the settlement of an account of his testator, allows a credit for a check, this is not such an administration of this part of the assets as will preclude an administrator *de bonis non*, from sustaining an action to recover the amount of the check, which he proved to be a forgery.

A promise laid in one count, as having been made to the testator in his lifetime; and in another, as having been made to his administrators after his death, is not such a misjoinder of counts, as will be fatal to a general verdict and judgment.

Wherever the funds to which the money and the costs are to be applied, or out of which the costs are to be paid, are the same, and the money when recovered would be assets, then the counts may be joined.

**WRIT** of error to the District Court of Lancaster county.

The defendants in error were plaintiffs below, and brought an action on the case, against the *Bank of Pennsylvania*, to recover the sum of two thousand five hundred dollars, with interest from the 22d March, 1819, under the following circumstances.

*Samuel Jacobs*, the plaintiff's testator, was a depositor in the *Bank of Pennsylvania*, which in the year 1819, paid six checks signed

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"*Samuel Jacobs*," the last of which was for two thousand five hundred dollars, and dated 22d March, 1819, and for the amount of which this suit is brought.

*Samuel Jacobs*, the testator, died on the 14th April, 1819, having first made a will and testament, by which he appointed *William Coleman* and *James Coleman* to be his executors. Afterwards, on the 5th June, 1819, *William Coleman* went to the bank, with the testator's bank-book, and had it settled, including the check of two thousand five hundred dollars in the settlement, and received from the bank the six checks. Upon his return to the late residence of his testator, some of the heirs doubted the genuineness of the check of the 22d March, 1819, and one of them pronounced it a forgery. On the 2d July, 1819, Mr. *Coleman* returned to the bank, and brought with him the checks and book, which were examined by the cashier and others, and then thought to be genuine, and Mr. *Coleman* was of the same opinion; and said that the heirs wished him to bring suit against the bank to recover the money, but unless they could produce some proof to him, he would not do it. On the same day, the balance in favour of *Samuel Jacobs*, of two thousand five hundred and eighty seven dollars and sixty-nine cents, was transferred by the check of *William Coleman*, to the credit of *William Coleman* and *James Coleman*, executors of *Samuel Jacobs*, deceased, with whom the account continued till 10th January, 1821, when it was finally closed, and the balance of three hundred and eighty-nine dollars and twenty-four cents, drawn out by *William Coleman*.

On the 3d January, 1821, *William* and *James Coleman* settled a final account of their administration of the estate of *Samuel Jacobs*, and were discharged by the orphans' court; when letters of administration *de bonis non*, with the will annexed of *Samuel Jacobs*, deceased, issued to *Jacob M. Haldeman* and *Richard T. Jacobs*, who gave to *William* and *James Coleman*, a receipt and acquittance in full for the balance in their hands.

The following declaration (the joinder of counts in which was assigned as error,) was filed.

LANCASTER COUNTY, ss.

The President, Directors and Company of the Bank of Pennsylvania, were summoned to answer Jacob M. Haldeman and Richard T. Jacobs, administrators of all and singular the goods and chattels, rights and credits, which were of Samuel Jacobs deceased, left unadministered, with the will of the said Samuel Jacobs, deceased, annexed, of a plea of trespass on the case, &c. And whereupon, the said Jacob and the said Richard, by George W. Jacobs, their attorney, complain, That whereas the aforesaid President, Directors and Company, on the first day of March, in the year of our

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Lord, one thousand eight hundred and nineteen, at the county aforesaid, were indebted to the said Samuel Jacobs, now deceased, in his lifetime, in the sum of five thousand dollars, lawful money of the United States, for so much money by the said President, Directors and Company, before that time had and received, to and for the use of said Samuel Jacobs, now deceased. And being so indebted, they, the said President, Directors and Company, in consideration thereof, afterwards, to wit: on the day and year last aforesaid, in the county of Lancaster aforesaid, undertook, and then and there faithfully promised the said Samuel Jacobs, now deceased, in his lifetime to pay him the said last mentioned sum of money, when they, the said President, Directors and Company should be thereunto afterwards requested.

Yet the said President, Directors and Company, not regarding their said promise and undertaking, but contriving and intending to deceive and defraud the said Samuel Jacobs, in his life time, and the said Jacob and the said Richard as administrators, as aforesaid, after the death of the said Samuel Jacobs in this behalf, have not as yet paid the said sum of money, or any part thereof, to the said Samuel Jacobs in his life time, or to the said Jacob or the said Richard, administrators aforesaid, since the death of the said Samuel Jacobs, (although often requested so to do,) but they so to do have hitherto wholly refused, and still do refuse, to pay the same or any part thereof to the said Jacob and the said Richard, as administrators as aforesaid.

And whereas, also the said Jacob M. Haldeman and Richard T. Jacobs, administrators of all and singular the goods, chattels and credits which were of Samuel Jacobs, deceased, left unadministered, with the will of the said Samuel Jacobs, deceased, annexed, complain against the President, Directors and Company of the Bank of Pennsylvania, For that whereas, heretofore to wit: on the twenty fourth day of December, in the year of our Lord, one thousand eight hundred and twenty-three, at the county of Lancaster, aforesaid, the aforesaid President, Directors and Company were indebted to the said Jacob and the said Richard, as administrators as aforesaid, in the sum of five thousand dollars, lawful money of the United States, for so much money by them, the said President, Directors and Company, to the use of the said Jacob and the said Richard as administrators as aforesaid, before that time had and received: And being so indebted, they, the said President, Directors and Company, in consideration thereof, afterwards, to wit: on the day and year last aforesaid, undertook, and then and there faithfully promised the said Jacob and the said Richard, administrators as aforesaid, to pay them the said sum of money last mentioned, whenever afterwards they the said Presi-



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dent, Directors and Company should be thereunto afterwards requested. Yet the said President, Directors and Company, not regarding their said promise and undertaking, so as aforesaid made, but contriving and intending to deceive and defraud the said Samuel Jacobs in his life-time, and the said Jacob and the said Richard, as administrators as aforesaid after the death of the said Samuel Jacobs, in this behalf, hath not as yet paid the said sum of money, or any part thereof, to the said Samuel Jacobs in his life-time, or to the said Jacob and the said Richard, as administrators as aforesaid, since the death of the said Samuel Jacobs, although to do the same, afterwards to wit: the second day of January, in the year of our Lord one thousand eight hundred and twenty-four, at the county of Lancaster, aforesaid, they were required; but the same to pay to them, the said Jacob and the said Richard, as administrators as aforesaid, they the said President, Directors and Company have hitherto wholly refused and still refuse to pay the same, or any part thereof, although often requested so to do.—To the damage of the said Jacob M. Haldeman and Richard T. Jacobs, as administrators as aforesaid, in the sum of seven thousand dollars.

And therefore they bring this suit, &c.

JOHN DOE and } *Pledges of*  
RICHARD ROE, } *Prosecution.*

And the said Jacob M. Haldeman and Richard T. Jacobs, bring here into court the letters of administration in due form of law, which give sufficient evidence to the said court here, of the grant of administration to the said Jacob and said Richard as aforesaid.

The pleas were *non assumpsit*, and payment with leave &c. replication, *non solvit*. Issues.

The plaintiffs, to maintain the issue on their part, called Mr. Ogilby, the cashier of the bank, to whom the six checks were exhibited, and who said, "I presume these are the same checks I gave to Mr. William Coleman: I believe the checks to be the same." They then offered to read the checks to the jury; to which the defendant objected, which objection was overruled by the court, and the evidence admitted, which formed the first bill of exceptions.

General Foster, being sworn as a witness, and having said, that he was well acquainted with the hand-writing of Samuel Jacobs: The plaintiffs proposed to ask him this question: "from your knowledge of the hand-writing of Samuel Jacobs, and from comparing the check of March 22d, 1819, with those parts of the check of Jan. 20th, Jan. 21st, Feb. 4th, March 1st, and March 21st, 1819, which you have stated to be in his hand-writing, what is your opinion and belief as to the signature and body of the check of March 22d, 1819, being in the hand-writing of Samuel Jacobs;"—

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to which the defendant objected, but the objection was overruled and evidence given, which formed the *second bill of exceptions*.

The plaintiffs then offered to prove, "that John Eberman is and has been cashier of the Farmers' Bank of Lancaster for 12 years—that Wm. White was cashier of the Lancaster Bank for seven years prior to October, 1824—that John Schmidt is and has been cashier of the York Bank for ten years—and that the said Eberman, White and Schmidt, are and have been for the said number of years, experienced and skilled in the examination of bank notes, checks and other writings, with a view and for the purpose of detecting forgeries." And to prove by said witnesses that in their opinion and belief, the check of 22d March, 1819, is not the hand-writing of Samuel Jacobs, nor any part thereof—said opinion and belief being formed from comparing the said check with the signature and whole check of January 20th, 1819—the signature to the check of January 21st, 1819—the signature and whole check of February 4th, 1819, excepting the marks and figures at the head "\$350=00" the signature to the check of March 1st, 1819, and with the whole check of 21st March, 1819: which have been testified by John Forster, Henry Alward and Joseph Wallace, to be in the hand-writing of Samuel Jacobs, and that in their opinion and belief the part of the check of March 22d, 1819, which is in writing, is written in an imitated character or traced hand."—To all which the defendant objected, but the court admitted to go in evidence, that part of the offer, which is in italic letter, which formed the *third bill of exceptions*.

John Eberman was then sworn, and said, "that he had been cashier of the Farmers' Bank of Lancaster eleven years, that he was often called upon to detect forgeries,"—as to the check in question, he said, "from the appearance of this check I could not say that it is imitated: I never saw Mr. Jacobs write; I do not know his hand-writing at all." The witness was then shewn the check of the 21st March, 1819; and the plaintiffs offered to prove by him, "That in the beginning of the year 1824 or about that time, this check of the 21st March, 1819, with the other 5, were exhibited to the witness. That at that time, in the word March, the h had a singular turn at the end of it, which the witness will describe—that the witness was not certain whether it was ink or some other substance which adhered to the paper—that the witness touched it with his pen-knife to ascertain what it was, and it came off—the mark of it being yet visible or nearly so on the paper; and that the said mark was precisely similar to the mark at the end of the h, in the word March, on the check of 22d March, 1819, for two thousand five hundred dollars," which was objected to, objection overruled, and testimony admitted; which formed the *fourth bill of exceptions*.

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*John Schmidt*, the witness mentioned in the third bill of exceptions, as to the check in question said, "I would not undertake to say whether that be a traced or fair hand; I should suppose it a slow hand; I would consider it a stiff hand. It would be necessary for me to compare it with other writing to ascertain whether it is a traced hand or not; I am not acquainted with the hand-writing of Mr. Jacobs."

*William White* was not sworn at all.

The plaintiffs then offered to prove by *Christian Drubaker*, that in the winter or spring of 1819, as executor of one *Kyser*, he sold a plantation to *Samuel Jacobs*, for four thousand dollars, payable on the 1st April, 1819; that witness wanted money to loan to his brother, and went to Mr. Jacobs and got in advance one thousand dollars, on the 22d March, 1819, by a check on the Office of Discount and Deposit at Lancaster, here shewn, and erroneously dated 21st March, 1819; that soon after that, Mr. Jacobs got sick, and witness never saw him again; witness went to his house or office, on the 1st April, 1819, but found him so sick that he did not see him; the balance of the money due witness, was paid in cash by *William Coleman*, after Mr. Jacobs' death,"—which evidence was objected to by the defendant, the objection overruled by the court, and testimony admitted, which formed the fifth bill of exceptions.

The plaintiffs having closed their testimony, the counsel for the defendants before they proceeded to open their case, moved the court to withdraw from the consideration of the jury, the six checks given in evidence, on the ground that they had not been legally identified; and to overrule all the evidence given on the part of the plaintiffs, except that contained in the first twelve lines of the Judges notes of Mr. *Ogilby's* testimony, Which the court refused to do, and which formed the sixth bill of exceptions.

The defendants to maintain the issues on their part, now offer after the evidence already given, the inventory exhibited on the 22d May, 1819, by *Wm. and James Coleman*, executors of *Samuel Jacobs*, deceased, to the Register of the county of Lebanon, and also the administration account of the said executors, exhibited 1st December, 1820, and finally passed and confirmed on 3d January, 1821, and in connection with those, a receipt and acquittance from *Jacob M. Haldeman* and *Richard T. Jacobs*, administrators *de bonis non* then appointed, bearing date 3d January, 1821, the said receipt and acquittance having been given by the said administrators *de bonis non* to the aforesaid executors," to which the plaintiffs objected, the court sustained the objection, which formed the seventh bill of exceptions.

The defendants' testimony being closed, the plaintiffs made the following offer "The defendants having given in evidence by Mr.

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*Ogilby*, that the check of two thousand five hundred dollars, was paid to a boy; the plaintiffs now offer to prove that *Christian Brubaker* sent his check of one thousand dollars, dated 21st March, 1819, to the bank, by a boy out of *Ober and Kline's* store—that the boy who went to the bank for the money was about 12 or 14 years of age, who returned in a few minutes and brought the money with him,” to which the defendant objected, the objection was overruled, and testimony admitted, which formed the eighth bill of exceptions.

The testimony being closed, the defendant propounded to the court, the following points, upon which they were requested to charge the jury.

1. That after probate of the will and a grant of letters of administration, an executor is the only legal representative of the testator, for the purpose of settling his estate. That in the settlement of the personal estate, at least, his powers are limited only by the laws of the land, or by an express restriction in the will. That he may collect debts and pay creditors, settle or compound for outstanding accounts, and that so far as regards the debtors and creditors, the settlement is final and conclusive, and can never be enquired into or overhauled by any succeeding executor or administrator *de bonis non*.

2. That an administrator *de bonis non* is confined by his very appointment, to the administration of such portion of the estate, as was unadministered by his predecessors.

3. That as it is an uncontradicted proof, that *W. Coleman*, one of the executors duly appointed of *Samuel Jacobs*, deceased, did on the 5th June, 1819, settle the accounts of his testator with the office of Discount and Deposit at Lancaster, and approved of its correctness; and at that time received and took into his possession all the checks then remaining in the said office; including the one dated 22d March, 1819, the subject-matter of this suit; and as he on 2d July following, after full knowledge of the suspicions entertained by some of the heirs as to the genuineness of the above mentioned check, drew by his check of 2d July, 1819, in the name of *Wm. Coleman*, executor of *Samuel Jacobs*, deceased, the whole balance then due to his testator by the said office, viz: two thousand five hundred eighty-seven dollars and sixty-nine cents: and afterwards deposited the same to the credit of *Wm. and James Coleman*, executors of *Samuel Jacobs*, deceased; that this was such a settlement as must completely protect the present defendants.

4. That as it is in express proof, by the letter of administrations *de bonis non* given in evidence by the plaintiffs, that subsequently to the 2d of July, 1819, the date of the settlement with the office of Discount and Deposit as set forth in the preceding point, *Wm. and James Coleman*, executors of *Samuel Jacobs*, deceased, settled their

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administration account on the said estate, and that the same was approved of by the orphans' court of the county of Lebanon, before they were discharged from their trust as executors aforesaid; and as the said account remains until this day in full force and unappealed from, that this is such an administration of this part of the assets, as must entirely prevent the present plaintiffs from recovering in this suit.

5. That as the money, the subject matter of the present suit, was voluntarily settled for, and paid by the executors of *Samuel Jacobs*, deceased, to the present defendants, and by them received without any fraud or unfair practice, it could never be recovered even by the executors themselves, and *a fortiori* not by the administrators *de bonis non*.

6. That it is well settled as a general rule of evidence, that the best evidence the nature of the case will admit of, must be produced; and as it is in proof that *William Coleman*, to whom *Joseph Ogilby* the witness, delivered the checks, was present, attending the trial of this cause; and as the plaintiffs have not thought proper to call him to prove the identity of the six checks read in evidence to the jury, and particularly the check of 22d March, 1819, for two thousand five hundred dollars, now alleged to be counterfeit, and to recover the amount of which, with interest, this suit is brought; the plaintiffs therefore cannot recover, and the jury must find for the defendants.

7. That the belief of the three witnesses, *Joseph Ogilby*, *John Elder* and *George Beckel*, as to the identity of the check of 22d March, 1819, is not evidence, that it is the same check that was paid by *Joseph Ogilby*; the plaintiffs must prove the actual fact of identity, and not having done so, they cannot recover in this suit.

8. That mere belief is no evidence, except from necessity; and when the party has it in his power to prove the actual fact, he must do so, and nothing short of that is evidence.—And wherever there is an allegation of forgery, as in this case, it is indispensably necessary to prove the identity of the thing alleged to be forged; and as the plaintiffs (if the fact were so,) had it in their power to prove that this was the identical check paid by Mr. *Ogilby*, and have not so proved, they have failed to maintain their action and the verdict must be in favor of the defendants.

9. That the opinion and belief of witnesses, in regard to the genuineness of writing, must be founded upon the impression made upon their minds by the hand-writing itself; and opinion or belief founded not upon this, but upon extrinsic circumstances is *prima facie* evidence of the genuineness of the instrument in question.

WILLIAM JENKINS,  
JOHN R. MONTGOMERY.

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**CHARGE OF THE COURT.**—This is an action on the case, brought by the administrators *de bonis non*, of Samuel Jacobs, deceased, against the Bank of Pennsylvania, to recover from that institution, two thousand five hundred dollars, which the plaintiffs allege was improperly credited to the bank, in the deposit account of the deceased, on a check which they allege is forged, dated on the 22d March, 1819, for that sum.

Administrators *de bonis non*, are administrators after the first administrators or executors of a deceased have died, or have been discharged by the proper authority from their trust. Their office is to administer the goods and chattels of the deceased, which have not been administered by the first administrator or executor; and one of the questions that arise in this cause, of which the court will give you their opinion presently, is, whether the money in question has been administered upon by *William* and *James Coleman*, who were the executors of the will of the deceased.

1st. point. The executors of a deceased are, during their continuance in office, the only representatives of the deceased, in relation to his personal property, and in the discharge of their trust in settling and managing the personal estate, their power is limited only by the law and the will of the testator, whom they represent. They may collect debts, pay creditors, and settle and compound for outstanding accounts. In this case the defendants contend, that the executors on the 5th of June, 1819, made a settlement of the account between the estate of *Samuel Jacobs*, deceased, and the bank; and that on the 2d of July, afterwards, they recognized the settlement, by drawing from the bank the balance due on the books of the institution, and depositing it to their credit as executors. That in the settlement there was comprised, as one of the items of credit to the bank, the sum of two thousand five hundred dollars, which the bank had paid on the check of the 22d March, now alleged to be forged. The plaintiffs deny that this was a final settlement of the accounts between the bank and the estate, and allege that no examination of the items took place by the executors who made it, and contend that it amounts to no more than receiving on their part, from the bank, what appeared due on its books. Whether the executors, or any one of them, did examine the account and approve of it, and make a final settlement, is a matter of fact for your consideration. If they did not make a final settlement with the bank, but only received from the institution what appeared to be due on its books, then, if the check in question be a forgery, and the bank has taken credit for it, and has not paid it to the executors—the two thousand five hundred dollars in question, are a part of the estate of the deceased, which was not administered upon by the executors, and may be recovered in this action.

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A settlement made by an executor, between the estate of the testator and one who is indebted to it, is so far final and conclusive upon the subsequent administrator *de bonis non*, who is appointed after the executor resigns or dies, that he cannot overturn it, unless he can shew, by clear and satisfactory evidence, that there was a mistake in such settlement, or some fraud practised on the executor, by which such debtor obtained a credit against the estate, to which he was not in law or justice entitled. If he can so make out such mistake or fraud, the administrator *de bonis non*, may recover the amount of such mistake, as goods of the deceased which have not been administered by the executor. To apply this rule to the present case. If the jury are satisfied, that the check in question of the 22d of March 1819, for two thousand five hundred dollars, is the same check for which the bank, in the settlement with the executors got a credit of that sum; if they are also satisfied that the check is a forged paper, and that in the settlement, the executors of *Samuel Jacobs* supposed it to be genuine, and under that mistake on their part, it was credited to the bank; then the two thousand five hundred dollars, in the check mentioned, may be recovered by the present plaintiffs, as so much of the estate of the deceased *Samuel Jacobs*, which did not come to the hands of his executors, and was not administered by them.

2d point. The administrator *de bonis non*, is confined by his appointment, to the administration of such portions of the estate, as were unadministered by his predecessor.

3d point. In answer to the third point, the court say—whether the facts be as they are stated in this point, the jury must judge—but taking them to be all true, as they are stated, it does not follow, as an unconditional conclusion of law, that the plaintiffs cannot recover. If such fraud or mistake happened in the settlement, if one was made, as the court has mentioned, and the jury are satisfied of the identity of the check in question—that it is forged, and that it was credited in the settlement by the executors under a mistaken idea that it is genuine, as the court has already said, the plaintiffs may recover.

If the jury be of opinion, that the executors did, on the 5th of June, 1819, make a settlement of the account between the estate and the bank, and that afterwards, on the 2d of July, 1819, and after they had their attention drawn to the subject, by being informed of the suspicions of some of the heirs that the check in question was a forgery, they confirmed it—they will take it into consideration, together with the lapse of time from July, 1819 before the bringing of this suit, when they come to make up their opinion on the question, whether the check of 22d March, 1819, is a forgery or not.

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4th point. In answer to the fourth point the court say—That the recitals in the letters of administration *de bonis non*, given in evidence by the plaintiffs, must be taken to be true. They show that before the granting of them, the executors had settled their account, as stated in this point. The presumption of law is, that the account, so settled by the executors, contained a full and perfect account of all the assets of the deceased, which had come to their hands at the time they were discharged from their trust, and that it was duly settled and approved by the proper authority. Whether the settling of the administration account by the executors, as stated in this point, was an administration of the part of the assets of the deceased, now in question in this suit, depends on the fact, whether the two thousand five hundred dollars, mentioned in the check in question, had previously to that time, come to the hands of the executors. If they had received the money in question from the bank, the plaintiffs could not recover in this suit, whether they charged themselves with it in their administration account or not. If they charged themselves with it in their administration account, settled by them, they have administered on it, and the plaintiffs cannot recover, whether they have received it of the bank or not. If they neither received it from the bank, nor charged themselves with it in their account, then the settling of an account as mentioned in this point, would not be an administration on this part of the assets of the deceased, and the plaintiff is not, on that account, prevented from recovering.

5th point. In answer to the fifth point the court say—Where money is paid by one man to another in such circumstances, that the party who receives it may, in good faith and conscience retain it. But when a bank has credit allowed to it in a settlement with an individual, for a check it has previously paid out, this is no payment by the individual to the bank, whether the check be genuine or forged. If it be a genuine check, the bank of course cannot be called on again for the money—if it be forged it can.

6th point. To the sixth point the court say—In a prosecution for a forgery of a bank note, it is necessary for the prosecutor to show, either that there is some particular mark on the paper charged to be forged, by which it can be identified, or he must produce every person who has had the custody of it since it was passed by the prisoner, to make out the identity. But the court is of opinion, this strictness is not necessary in civil cases; in criminal cases the prosecutor is himself a witness, and therefore can form a link in the chain of proof of identity—but in civil cases the plaintiff cannot be examined, and therefore if it were necessary to produce as a witness in court, every person who has had custody of the paper, when it had come to the hands of



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the plaintiff, the identity could not be made out, except in cases where some particular mark had been put on it. Secondary evidence is such as indicates, that there is better evidence behind, in the power of the party, which he declines to produce. Whether *William Coleman* could have identified the check in question better than the witnesses who have been examined, is entirely contingent—they had passed out of his hands into the hands of the plaintiffs. The court is therefore of opinion, that the plaintiffs were not bound to produce *William Coleman*, to prove the identity of the check in question. Whether they be the same checks which were by the bank delivered by *William Cokman*, is a matter of fact, which must be submitted to the jury.

7th point. In answer to the seventh point the court say—Mere belief of a witness unacquainted with the matter touching what is to be examined, is certainly no evidence. The witnesses who speak on the subject of the identity of the check of the 22d March, 1819, are the cashier of the bank, *J. Ogilby*, and *George Beckel*, who was at the time a clerk in the institution; both of whom had seen it in bank, and *John Elder*, who had seen it while it was in the custody of *William Coleman*. You have heard what these witnesses have said on the subject. The fact that the check given in evidence of the 22d March, 1819, is the same, or whether the bank had the two thousand five hundred dollars in question in this suit, is an important one in this cause, and before the plaintiffs can recover, they must make it out by clear and satisfactory evidence. If the evidence before you, satisfies your minds of the fact, that the check given in evidence is the same check, you may find it without any more positive proof: If you are not satisfied of this fact, your verdict ought to be for the defendants.

8th point. The court have already in substance answered this point. The court have submitted to you, the question of fact in relation to the identity of this check of 22d March 1819, as well as of the other checks. It is for you to judge, whether the evidence gives you entire satisfaction or not. If it does not, you ought to find for the defendants; if it does, then you will find the fact of the identity, as the court have referred it to you.

9th point. The opinion of a witness in regard to the genuineness of a writing, must be founded on impressions made on his mind by hand-writing itself. When a witness is called who knows the hand-writing of the person whose name is alleged to be forged, and he is of opinion, without referring to facts extrinsic of the writing, that it is a genuine paper, his evidence must go to the jury as *prima facie* evidence of the genuineness of the paper. If such a witness cannot say, on examining it, whether it is genuine or not, without recurring to extrinsic facts in relation to it, it proves either that it is the

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hand of the person who purports to have written it, or that it is so good an imitation, that it is very difficult to discriminate between it and the genuine writing of the person.

Finally, the case submitted to your consideration is an important one, not only on account of the amount in controversy, but on account of the nature of the facts which you are to determine. The plaintiffs allege, that the check in question, of the 22d March, 1819, is the same check on which the bank paid out the two thousand five hundred dollars, for which the suit is brought, and that it is a forgery. If they have made out these facts by evidence which satisfies your minds, they can recover; but if they have failed in proving either of them, to your satisfaction, they cannot recover.

In this court the following errors were assigned:

1. The court erred in admitting in evidence, the checks objected to by the defendant's counsel, and enumerated in, and made the subject of the first bill of exceptions.

2. The court erred in permitting the plaintiffs to give in evidence, the matters contained in, and made the subject of the second bill of exceptions.

3. The court erred in permitting the plaintiffs to give in evidence, that part of the offer marked in *italic letter*, and recited in, and made the subject of the third bill of exceptions.

4. The court erred in permitting the plaintiffs to give in evidence, the matters contained in, and made the subject of the fourth bill of exceptions.

5. The court erred in permitting the plaintiffs to give in evidence, the matters contained in, and made the subject of the fifth bill of exceptions.

6. The court erred in over-ruling the motion made by the counsel of the defendants, and contained in, and made the subject of the sixth bill of exceptions.

7. The court erred in refusing to allow the defendants to give in evidence the matters contained in, and made the subject of the seventh bill of exceptions.

8. The court erred in admitting in evidence, on the part of the plaintiffs, the matters contained in, and made the subject of the eighth bill of exceptions.

9. The court erred in their answers to the first, third, fourth fifth, sixth, seventh and eighth points, proposed by the counsel for the defendants.

10. There is a misjoinder of counts in the declaration, and the general verdict rendered thereon is erroneous.

11. The declaration sets forth no cause of action on the part of the plaintiffs.

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*Montgomery and Jenkins*, for plaintiff in error.

1st bill. Mr. *Ogilby* having parted with the possession of the checks, and they having passed into the hands of several persons afterwards, his testimony was not sufficient so to identify the checks, as to make them competent evidence to go to the jury. If a witness who identifies a forged paper has parted with the possession of it for a time, the person into whose possession it was put by him, must be called. *Commonwealth v. Kinnison*, 4 Mass Rep. 646.

2d bill. Although the witness had seen the testator, Mr. *Jacobs*, write, and knew his hand-writing, yet he was permitted to answer the question, not predicated upon his knowledge, but upon the comparison of the hand-writing in the check in question, with other checks admitted to be genuine. A comparison of hand-writing is never allowed, except in *corroboration* of testimony derived from knowledge of the hand-writing. It is never admitted of itself, to destroy, but to support other testimony. *Norris' Peake's Ev.* 154. *Jackson ex dems v. Vaudusen*, 5 Johns. Rep, 141. *Vickroy v. Skelly*, 14 Serg. & Rawle, 372. *Decosta v. Pim*, Appendix to *Peake's Ev.* 42.

3d and 4th bills. The testimony admitted was, that of an *expert* in judging of handwriting. This point is new in Pennsylvania, and that very circumstance is a strong argument against the *necessity* of adopting such a rule of evidence. The ordinary ties which induce many witnesses to speak the truth, will not operate upon the mind of an *expert*—if he falsifies he need not fear detection; for he does not speak of facts, but his own opinion. It would be dangerous to *create* such a class of witnesses, who would be operated upon by their own fancied ingenuity or dexterity in detection. The doctrine is repudiated in 2 *Stark. Ev.* 658.

5th bill. Circumstances unconnected with the paper alleged to be forged, is incompetent evidence. *Norris' Peake* 154.

6th bill. It is competent for the court to withdraw illegal evidence from the consideration of the jury—and that the evidence was illegal, is argued in the foregoing bills.

7th bill. It had appeared in evidence, that at the time the inventory was taken, Mr. *Haldeman*, one of the present plaintiffs, who is also one of the heirs, was present, and saw the balance struck in the testator's bank-book, predicated upon the allowance of the amount of this check to the bank—and the testimony offered and rejected by the court, was for the purpose of establishing the fact, that he had acquiesced in that settlement, by permitting the administration account of the executors to be settled, without objection; predicated, as to that part of the administration, upon the settlement made by Mr. *Coleman*, with the bank several years before, which ought to have had a powerful influence upon the jury.

8th bill. The testimony was not rebutting.

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9th bill. (To the charge of the court.)

1st, 2d, 3d, and 4th points. The duties of an administrator *de bonis non*, are limited to the management of such goods of the testator or intestate, as have not been administered by the executor or previous administrator, or mixed with his own; and therefore the subject matter of this suit having been acted upon and settled by the executor, the administrator *de bonis non*, has no power over it. 3 Bac. Ab. 19. *Grout v. Chamberlain*, 4 Mass. 611. If the executor erred in that settlement, the heirs may look to him to correct that error as it respects their interest. *Allen v. Irwin*, 1 Serg. & Rawle, 549. The act of an executor is conclusive upon all persons interested in the estate. *Jacob v. Harwood*, 2 Ves. 267. *Nugent v. Giffard*, 1 Atk. Rep. 463. *Moore's Cases*, 494. In *Packman's case*, 6 Coke 19, it is decided that the act of an executor, although fraudulent, is binding against the second administrator, but it is otherwise as to creditors. If there had been collusion between the bank and *William Coleman*, the executor, or if it had been a mere gift by the latter to the former; the heirs or legatees may pursue the fund into the hands of the bank, but there is no necessity for the interference of the administrator *de bonis non*, for the fund has already been passed upon, administered, by the personal legal representative of the estate. *Petre v. Clark*, 11 Serg. & Rawle, 377. *Skinner* 143. *Com. Dig.* 271. title *Administrator*. 2 Eq. Ca. Ab. 424. If an executor settles a claim of the estate, and takes from the debtor his note for a balance due, the administrator *de bonis non*, can never recover that balance from the executor or his representative. *Wankford v. Wankford*. 2 Salk. 306. 2 *Ventris*, 562. *Vernon*, 173. Upon the settlement between the bank and the executor, taking the mistake for granted, the bank had and received the money for the use of the executor, and on this ground, the administrator *de bonis non*, cannot recover.

5th point. When the settlement took place between the executor and the bank, each party had a full knowledge of all the facts; and upon that knowledge the executor exercised his discretion and allowed this check to be credited to the bank; and the matter thus rested for four years and upwards, by which the bank was lulled into security, and all hope of detecting the forger and saving itself was gone when this suit was brought;—may not the defendant, under these circumstances *ex equo et bono*, now refuse to pay the money. On this point were cited *Ledy v. The Bank of the U. States*. 1 Bin. 27. *Morris v. Turin* 1 Dal. 147. *Rapalge v. Emory*, 2 Dal. 51. Money cannot be recovered from a defendant, which good conscience does not require him to refund. *Willing v. Peters*, 12 Serg. & Rawle, 177. *Dicchman v. Northampton Bank*, 1 Rawle, 54.

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6th, 7th, 8th and 9th points—have been argued in the first, second and third bills of exception.

There is a misjoinder of counts in the declaration. The promise to pay is the subject matter of the action, upon which the right to recover must depend—the first count lays the promise to have been made by the defendant to *Samuel Jacobs*, in his life time—the second lays it to have been made to his administrators, the present plaintiffs, in 1823. Such counts cannot be joined. 2 *Saund*, 117. *Bennet v. Verdeen*, 2 *Ld. Raym.* 841. 1 *Arch. Prac.* 59–60. 2 *Penn'a Prac.* 397. In all cases of promises made to, or by an executor or administrator, after the death of the testator or intestate, the action is personal, and therefore different from an action upon a promise by, or to the testator where the action must be in the representative character. *Grier v. Huston*, 8 *Serg. & Rawle*, 402. *Wolfsberger v. Bucher* 10 *Serg. & Rawle*, 11–13. The misjoinder is not cured by the verdict. *Stroecker v. Grant*, 16 *Serg. & Rawle*, 237.

Suppose the verdict to have been for the defendant, what would be the judgment thereon as respects costs? On the first count the judgment for costs would have been against the estate:—On the second, it would have been against the administrators personally.

*Porter and Elmaker*, for defendant in error.

1st. bill. The identity of the checks was a matter of fact for the jury, and the court could not have withheld them on the ground, that *sufficient* evidence had not been given to satisfy the jury that they were the same which the executor had received out of bank. The checks had been in the possession of the plaintiffs in this suit, who could not have been examined. *The Commonwealth v. Kinnison*, 4 *Mass.* 646, is a criminal case, wherein strictness is required, and is not applicable to this principle involved in a civil suit. It was alleged by the plaintiffs that the check of the 22d March, 1819, in question, was made in the bank, by tracing the hand-writing of Mr. *Jacobs* from the other checks, hence the importance of letting all the checks go to the jury.

2d bill. The evidence offered, and to which exception was taken, was not matter of opinion derived from a comparison of hand-writing; but was the judgment of the witness, predicated upon his knowledge of the hand-writing of Mr. *Jacobs*, aided by a comparison of the alleged forgery with genuine signatures: being a much stronger and more satisfactory kind of evidence than knowledge without the aid of a refreshed memory. The case of *Vickroy v. Kelly*, 14 *Sergt. & Rawle* 372, is that a comparison of hand-writing *alone*, is not evidence in case of a public officer; from which the inference is strong, that if connected, as in this case, with actual knowledge of the hand-writing, it is good evidence. On this point, were cited *Farmers' Bank v. Whitkill*, 10 *Serg. & Rawle*, 110.

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*Homer v. Wallis*, 11 *Mass.* 309. But what rendered the evidence peculiarly proper, was that we alleged that the check in question was traced from the other checks.

3d bill. A person who is an *expert* may be permitted to testify whether a writing is a *traced* hand or original and genuine. *Lodge v. Piper*, 11 *Serg. & Rawle*, 333. *Hubly v. Vanhorn*, 7 *Serg. & Rawle*, 185. But even if the court of common pleas should have been in error in the admission of this evidence; under the circumstances this court will not reverse the judgment on that ground, for no evidence was given by the plaintiffs in pursuance of their offer, by which the defendant was prejudiced.

4th bill. The evidence offered was merely to shew the original state of the check of the 21st March, 1819, from which as to the word "March," we alleged the check in controversy was traced.

5th bill. It would be strange, indeed, if no evidence *dehors* the paper alleged to be forged, would be competent to prove the forgery. Other evidence may be absolutely conclusive, such as proof that the person whose name is alleged to be forged, was sick, had his arm broken, was out of the county or was under some other disability; and the circumstance of evidence being clear and satisfactory upon the point of inquiry, is a good reason to conclude that it is legal.

7th bill. This evidence was irrelevant—there is no mention made, either in the inventory or administration account of the check in question or the money in the bank of Pennsylvania—the inventory was made on the 22d June, 1819, and the settlement with the bank not until the 2d July following. The evidence would have had a tendency to embarrass, rather than to elucidate the case.

8th bill. If it was important for the defendant to give in evidence, by Mr. *Ogilby*, that the check in question was paid to a boy; it was equally important for the plaintiffs to prove that Mr. *Ogilby* was mistaken, that it was another check, in favour of another person, that was paid to a boy; which was the evidence offered and given.

9th bill. (To the charge of the court.)

As to the duties of an administrator *de bonis non*, were cited the *Stat. 17 Chas. II.* which is in force in Pennsylvania. *Turner v. Davies*, 2 *Soun.* 149. 3 *Bac. Ab.* 20. When an executor actually administers a fund or part of the assets of the estate, the administrator *de bonis non* would afterwards have nothing to do with it; but the money now claimed by the plaintiffs never was administered by the executors; on the contrary, they disclaimed having any thing to do with it, "unless the heirs would furnish them proof to establish their right to recover it," which was not done. Cer-

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tainly, if the heirs had furnished that proof to the executors at any time before they went out of office, they could have maintained the action, and if the right of action existed in the executors when they went out of office, it survives to the administrators *de bonis non*. An executor, having in his possession a bond due to his testator, demands the amount from the obligor, who produces the receipt of the obligee in full, with which the executor is satisfied, and so expresses himself: can it be, that, after the death or resignation of the executor, the administrator *de bonis non*, upon the discovery that the receipt is a forgery, cannot sustain a suit upon the bond? That case and the one before the court seem to be parallel as respects this point. If then the facts turn out to be such, as that the money is recoverable from the bank, who but the administrator *de bonis non* can sustain the action?—not the heirs, for if the estate should turn out to be insolvent they should not have the money—and not the creditors, for it could not be determined which of them would be entitled. If this suit is not rightly brought, it follows that the estate of Mr. Jacobs is entitled to the money, and has no remedy to recover it.

10th error. The money recovered upon either of the counts in the declaration would be assets of the estate; they are therefore rightly joined. *Malin v. Bull*, 13 Serg. & Rawle, 441. *Stevens v. Gregg*, 10 Serg. & Rawle, 234. *Strohecker v. Grant*, 16 Serg. & Rawle, 237.

The opinion of the court was delivered by

SMITH, J.—The defendants in error, who were plaintiffs below, brought an action of assumpsit, for money had and received, against the plaintiffs in error. The cause was tried on the pleas of non-assumpsit, and payment with leave to give the special matters in evidence. On the trial, various bills of exceptions were taken by the defendants, to the admission and rejection of testimony, and to the charge of the court. It became necessary to decide whether a certain paper, purporting to be a check, on the office of discount and deposit for two thousand five hundred dollars, dated the 22d of March, 1819, signed “*Samuel Jacobs*,” payable to himself or bearer, and which was actually paid at the office, was a genuine check or not. The defendants in error alleged that this paper was a forgery, and to prove their allegation, it was necessary to establish its *identity*; or, in other words, that the paper offered in evidence was the same which was received and paid in bank. Mr. Ogilby, cashier of the bank, declares that the bank paid the check to a little boy, on the 29th March, 1819. On Thursday, the 25th of March, 1819, in the afternoon, *Samuel Jacobs* was violently attacked with a cramp in his stomach, took to his room, and did not

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leave it, until he was a corpse—he died on the 14th of April, 1819. On the 5th of June following, *William Coleman*, one of the executors of *Samuel Jacobs*, deceased, took his bank-book to the bank to ascertain the balance due him; the cashier settled the book, and returned it to him, together with this and other checks. These checks were afterwards given to *Jacob M. Haldeman*, and by him to others. After the plaintiffs had proved, by *Mr. Ogilby* the cashier, *Samuel Jacobs*' bank-book, the various entries of credits in it, (enumerated all in the state of the case,) the settlement made in it on the 5th of June, 1819, and that he, the cashier, presumed the checks produced to be the same checks he had given up to *William Coleman*, that he knew nothing to the contrary, but believed the checks to be the same, and that he had filled up the one of the 1st of March, 1819, for two thousand dollars, at the counter of the bank—they offered to read to the jury the above stated entries in the bank-book and the checks aforesaid. To this offer, so far as respected the reading of the checks to the jury, the defendant's counsel objected. The court overruled the objection, and permitted the whole to be read—and this forms the first bill of exceptions. It is contended, that the papers admitted, had not been sufficiently identified, that the question was whether the check was a forged one or not, and that therefore it could not be read to the jury, unless all were called in whose hands it had been, nor unless the witness had marked the check before he had parted with it. It is true the question was whether the check was forged, but that question was for the jury, and therefore the evidence offered was clearly admissible to establish the point of indentity, which was involved in it. Whether it was satisfactory and sufficient for that purpose, it was for the jury to decide; but being relevant, the court could not do otherwise than refer it to them, with the check, in order that they might exercise their judgments upon that point, as well as upon the principal question. We are of opinion, that the evidence was sufficient to entitle the plaintiffs to read the checks to the jury. After the plaintiffs had read to the jury, the several checks, six in number, including the check alleged to have been forged; and had proved by *John Forster*, that he had seen *Samuel Jacobs* write frequently—draw checks in bank; that from the opportunity which had been given to him to examine this check, (having looked again at all the six checks,) he believed no part of it to be in the hand-writing of *Samuel Jacobs*, and also, that he had been in the habit of corresponding for many years with him on business—and had proved by *Henry Alward*, that he had seen the late *Samuel Jacobs* write, and that from the knowledge he had of his hand-writing, and taking every part of the



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check, he would say it was not his hand, and taking the whole check as it appeared, date, filling up, and signature, he would say it was not his hand-writing—and had proved by *Joseph Wallace*, that he had often seen *Samuel Jacobs* write, had dealt with him during the years 1812, 1813 and 1814, and received many letters from him, and seen him sign receipts for money paid, and that from his knowledge of the hand-writing of *Samuel Jacobs*, (and after looking at the check of 22d of March, 1819,) taking the whole of it together, he believed it not genuine; the plaintiffs offered to ask *Mr. Forster*, “from your knowledge of the hand-writing of *Samuel Jacobs*, and from comparing the check of March 22d, 1819, with those parts of the check of January 20th, January 21st, February 4th, March the 1st, and March 21st, 1819, which you have stated to be in his hand-writing, what is your opinion and belief as to the signature and body of the check of March 22d, 1819, being in the hand-writing of *Samuel Jacobs*.” To the offer so made, the defendant’s counsel objected, but the court allowed the question to be put, and this on the *second* bill of exceptions, is assigned for error. The question was properly allowed to be asked, according to the opinion of this court, in the case of the *Farmers’ Bank of Lancaster v. Whitehill*, 10 *Serg. & Rawle*, 110, in which it was decided, that comparison of hand-writing was admissible in evidence in civil cases, where it was in corroboration of other evidence, which tended strongly to support the fact in dispute. Three witnesses, *Mr. Forster* being one, had declared the check not to be the hand-writing of *Samuel Jacobs*; the proposed offer was not to establish solely from comparison of hands, that the check was a forgery, but in confirmation of other testimony already received, strongly tending to the same point, to show that the signature and body of the check of the 22d March, 1819, was not the hand-writing of *Samuel Jacobs*. Under such circumstances then, I apprehend, it was competent evidence to go to the jury, and after the opinion and belief of the witness was known, for him to compare the contested signature with other writings admitted to be genuine. It would seem to me, that where a witness has seen the person write, and declares he knows his writing, he may compare it with writings, which he has seen the person write, or which are admitted he wrote, and he may give his opinion and belief on the comparison, at least such testimony, may go to the jury, who, and they only, are to compare and decide whether the witness is correct or not as to the writing in controversy. The court below then were right in permitting the question to be asked.

I come to the *third* bill of exceptions. After the court had allowed the check to be thus compared with other genuine checks,

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and the jury to hear the opinion and belief of Mr. *Forster* in relation to it, the counsel for the plaintiffs proposed to go a step further, and to prove "that *John Eberman* is, and has been cashier of the Farmer's Bank of Lancaster for twelve years—that *William White* was cashier of the Lancaster Bank for seven years, prior to October, 1824—that *John Schmidt* is, and has been cashier of the York Bank for ten years; and that the said *Eberman*, *White* and *Schmidt* are, and have been, for the said number of years, experienced and skilled in the examination of bank notes, checks and other writings, with a view, and for the purpose of detecting forgeries, and that in their opinion and belief, the part of the check of March 22d, 1819, which is in writing, is written in an imitated character or traced hand." And this the court admitted them to prove, though objected to by the defendant's counsel. It was, in fact, permitting *experts*, as they are called, who never saw Mr. *Jacobs* write, from their professed knowledge or skill in hand-writing, to prove solely, from comparison, whether what purported to be the hand-writing of Mr. *Jacobs* in the disputed check was counterfeit or not. This cannot lawfully be done. It would have been error had the witnesses actually proved what was proposed to be proved by them. This opinion is fortified by the decision in *Lodge and another v. Phipper and Lloyd*, 11 Serg. & Rawle, 333. The question there was, whether a receipt in the name of *Reuben Haines* was forged or not; it was alleged to have been forged by a certain *William Shaw*, deceased. The court below permitted *Israel Pleasants*, on the ground of his being an *expert* in the examination of writings, to give *his opinion*, whether the receipt, and the papers proved to have been written by *Shaw*, were the same hand-writing. This, says the late Chief Justice, was giving very great weight, to matter of opinion, greater, I think, than it was entitled to, for *Pleasants* did not pretend to know any thing of the hand-writing of *Haines* or *Shaw*, nor did he form any opinion, but from the naked comparison of hands. The judgment was therefore reversed. The case under consideration, up to the time of this offer, had been placed before the jury on the evidence of those who could legally give some direct testimony, and on legal proof by comparison of this check with the others. But if witnesses were to be called in, and asked on oath, what conclusions they would draw, it would, in fact, be adding so many men to the jury, in other words, it would be permitting others to advise the jury what verdict they should render; it would not be trying the cause by *twelve* men returned by the sheriff drawn and sworn, but by them, together with as many others as a party could find, who would swear that the evidence was or was not satisfactory to their minds. It appears, however, that when the witnesses were examined, they could not, and did

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not prove what was proposed; for *Eberman* testified, that from the appearance of the check, he would not say that it was imitated; and *Schmidt* that he would not undertake to say, whether it was a fair or a traced hand. *White* was not called. So that it is evident the defendants suffered no injury from this decision of the District Court. Now in *Allen v. Rostain*, 11 *Serg. & Rawle*, 362. It is said to be a general and well known principle, that one shall not assign that for error, from which he has suffered no injury, for the administration of justice is not promoted by reversing a judgment for an error by which no injury has been sustained. However improper, therefore, the proposed testimony would have been, yet not being given, the opinion of the court below, as to its admissibility, cannot be assigned for error; nor can the judgment on this ground be reversed.

As to the error assigned in the *fourth* bill of exceptions; the plaintiffs offered to prove on the trial the actual state of the check of the 21st of March, 1819, in the beginning of the year 1824—that at that time, in the word “March,” the letter “h” had a singular turn at the end of it, that it was then touched with a pen-knife to ascertain whether it was ink or some other substance which adhered to it, and on this touch it came off, the mark of which being still visible on the paper; and that the said mark was precisely similar to the mark at the end of the “h” in the word “March,” on the check of the 22d of March, 1819, for two thousand dollars. In the admission of this proof I cannot perceive any error. These circumstances conduced to establish the forgery, and were therefore properly laid before the jury.

The *fifth* error assigned demands only a passing remark. The plaintiffs having given proof of Mr. *Jacobs*’ money concerns and payments, that he was a man of great accuracy in regard to his money, both as to receiving and paying it out, and that no traces could be found of having paid away this money, offered to prove by *Christian Brubaker*, that in the winter or spring of 1819, as executor of one *Keyser*, he sold a plantation to *Samuel Jacobs* for four thousand dollars, payable on the 1st of April, 1819, that the witness wanted money to loan to his brother, and went to Mr. *Jacobs*, and received, *in advance*, one thousand dollars, on the 22d of March, 1819, by a check on the same bank at Lancaster, offered to be shown, and erroneously dated the 21st of March, 1819; that soon after that Mr. *Jacobs* took sick, and witness never saw him again; that witness went to his house, on the 1st of April, 1819, but found him so sick that he did not see him, nor ask to see him, that the balance of the money due the witness was paid in cash by *William Coleman* after Mr. *Jacobs*’ death.” Why this was objected to, I am at a loss to conceive. It was evidence, even if it

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weighed but a feather, in the cause; when, however, it is considered, that it was known Mr. Jacobs had bought from *Christian Brubaker* land for four thousand dollars, to be paid on the 1st of April, 1819, and that he had actually paid him in advance one thousand dollars, on the 22d of March, by a check on the same bank, it was reasonable to suppose in the absence of proof to the contrary, that he drew the check of the 22d of March, 1819, for two thousand five hundred dollars, for the balance of *Brubaker's* claim, or in order to be prepared to pay him the residue of the four thousand dollars on the 1st of April following, according to their contract, and that, therefore, the money might have been drawn by himself for this purpose. Now to do away all idea of the kind, the plaintiffs offered to prove, that the balance of the purchase money was not paid by Mr. Jacobs, but by Mr. *William Coleman*, after Mr. Jacobs' death, and that although Mr. *Brubaker* had called at the office of Mr. Jacobs for it, on the 1st of April, yet he did not then receive it, on account of Mr. Jacobs' sickness, and consequent inability to transact business. Viewing the testimony in this light, I think it was correctly admitted.

The sixth error has, I think, been abandoned. If not, as it is a mere repetition of all the previous alleged errors, on which the court had passed their opinion, and brings up no new matter, it need not again be considered.

I proceed then to the consideration of the seventh error. After the plaintiffs had rested their cause, the defendants, on their part, proved by *Joseph Ogilby*, that on the 29th March, 1819, a check, (the one in question,) drawn by *Samuel Jacobs*, dated the 22d of March, 1819, payable to himself or bearer, for two thousand five hundred dollars, was presented by a boy, and paid by Mr. *Ogilby* to him at the bank; and that on the 5th of June following, *William Coleman* brought Mr. Jacobs' bank-book to the bank, and had the balance due to him struck, or settled by Mr. *Ogilby*, who returned Mr. *Coleman* the checks set down in it; that on the 2d of July next after, Mr. *Coleman* brought the bank-book and checks to the bank, and told Mr. *Ogilby* some of Mr. Jacobs' heirs doubted the check of two thousand five hundred dollars, and thought it not genuine, that he thereupon examined it carefully, thought it was Mr. Jacobs' hand-writing, and still thought so; that Mr. *Coleman* was of the same opinion, and said the heirs wished him to bring suit against the bank, to recover the money, but that he would not do it, unless they could produce some proof to him;—that Mr. *Coleman* took the book and checks and went away—that on the same 2d of July, the balance to the credit of *Samuel Jacobs* was two thousand five hundred and eighty-seven dollars and sixty-nine cents, that on that day they settled the book, and transferred the balance to the

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account of *William* and *James Coleman*, as executors of *Samuel Jacobs*, deceased. The defendants also gave in evidence the correspondence between *Thomas Elder*, on behalf of the heirs, and the officers of the bank, commencing on the 20th of February, and ending on the 25th of July, 1821; and then offered, after the evidence already stated, the *inventory*, exhibited on the 22d of May, 1819, by *William* and *James Coleman*, executors of *Samuel Jacobs*, deceased, to the Register of the county of Lebanon, and also the *administration account* of the same executors, exhibited the 1st of December, 1820, and finally passed and confirmed on the 3d of January, 1821, and in connection with them a *receipt and acquittance* from *Jacob M. Haldeman* and *Richard T. Jacobs*, administrators *de bonis non*, then appointed, bearing date the 3d of January, 1821, the said receipt and acquittance having been given by the said administrators *de bonis non* to the aforesaid executors, as appeared by the same papers; to all which the plaintiffs counsel objected, and were sustained in their objection by the court, who overruled the said testimony thus offered. The defendants in error contend, that these papers, being wholly irrelevant to the matter in issue, and only calculated to embarrass the cause, the court were right in rejecting them. In this I agree with them, for neither to the court below, nor to this court has *any* the least relevancy been shown. It cannot be pretended, that any of the papers show on their face, that the two thousand five hundred dollars were included, or mentioned in them, nor can any thing, relative to the bank, or this money be shown from the most minute examination of them. The plaintiffs in error, admit themselves, that the two thousand five hundred dollars, were not included in the inventory, administration account, or receipt, as their whole defence was rested on the ground that *William Coleman*, the executor did not receive the two thousand five hundred dollars from the bank, but allowed that sum to the bank on the settlement of the bank-book on the 5th of June, 1819. Again the third and fifth points put to the court by the plaintiffs in error *aver* distinctly, that the two thousand five hundred dollars were not received by *William Coleman*, and the fifth point says, that the money "*was voluntarily settled for and paid by the executors, of Samuel Jacobs, deceased, to the present defendants.*" How then, on the defendants own grounds, could the two thousand five hundred dollars have been included in the inventory, administration account, or receipt? The receipt is merely a receipt for *so much* as was in the executor's hands. If it be said, that these papers were evidence to show that the executors *had settled an account* of some kind, my answer is, that this was shown fully, and admitted by the plaintiffs below, *by the letters of administration de bonis non*, given in evidence by

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them, The recitals in those letters of administration must be taken to be true, and show that the executors *had settled an account that this account had been approved by the proper court, and that they had been duly dismissed.* And this appears fully from the fourth point put by the defendants below to the court. Indeed the answer of the court to the defendant's fourth point, is a complete answer to the 7th bill of exceptions, about the rejection of these papers. The court in their answer say, "That the recitals in the letters of administration *de bonis non*, given in evidence by the plaintiffs, must be taken to be true. They show that before the granting of them, the executors had settled their account, as stated in this point. The presumption of law is, that the account so settled by the executors, contained a full and perfect account of all the assets of the deceased, which had come to their hands at the time they were discharged from their trust; and that it was duly settled and approved by the proper authority. Whether the settling of the administration account by the executors, as stated in this point, was an administration of the part of the assets of the deceased now in question in this suit, depends on the fact whether the two thousand five hundred dollars mentioned in the check in question, had previously to that time come to the hands of the executors. If they had received the money in question from the bank, the plaintiffs could not recover in this suit, whether they charged themselves with it in their administration account or not. If they charged themselves with it in their administration account settled by them, they have administered on it, and the plaintiffs cannot recover, whether they have received it of the bank or not. If they neither received it from the bank, nor charged themselves with it in their account, then the settling of an account, as mentioned in this point, would not be an administration on this part of the assets of the deceased, and the plaintiffs are not, on that account, prevented from recovering." The acknowledged ground of defence, both in the court below, and in this court, shows that these papers could not have been in any way material or relevant, and therefore, there was no error in rejecting them.

A word as to the eighth bill of exceptions will suffice. The defendants had proved by Mr. *Ogilby*, that the check of two thousand five hundred dollars had been paid by him to a boy or young lad—the plaintiffs offered, (and as I understand it, in order to show that Mr. *Ogilby* was, or might be mistaken, in his recollection as to this,) to prove that *Christian Brubaker* gave his check for one thousand dollars, dated, (though erroneously,) the 21st of March, instead of the 22d of March, 1819, to his son, *Benjamin Brubaker*, who came to Lancaster to draw the money sometime the latter end of March or beginning of April, 1819, and when he came to Lan.

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caster, he thought there might be some difficulty in getting the money at bank, and therefore went to *Ober & Kline's* store, and requested Mr. *Kline* to send a boy, (then about twelve or fourteen years of age,) to the bank for the money, who returned in a few minutes with the one thousand dollars, the amount of the check. As the evidence was intended to show a mistake in the recollection of Mr. *Ogilby*, or to correct the mistake, if any, it was properly offered, nor was there any error in receiving it for that purpose.

Having thus disposed of all the errors assigned respecting the admission and rejection of evidence, I will proceed to consider the errors assigned in the answers of the court to the points proposed by the counsel for the defendants. These were nine in number, and the court were requested to reduce their answers to writing and file them of record. This the court did, and in my opinion, answered fully and very satisfactorily, each and every point. The first, second and third points, all relate to one subject, to wit, on whom the settlement of the estate of persons dying testate or intestate devolves, and also whether an administrator *de bonis non*, is confined to the administration of that portion of the estate which was left *unadministered* by his predecessors. The court below answered that the settlement of such estates belongs to, and devolves on the executors, and the administrator *de bonis non*, is confined to the estate unadministered by them. I subscribe entirely to the correctness of the answers of these three points. If an executor settles an account between the decedent and a third person, and then introduces it into his administration account, the administrator *de bonis non* has nothing to do with the transaction, because, the executor having once received a credit for it, (or if he be charged with it,) it is to be considered as belonging to that portion of the estate which has been administered by him; but if on the other hand, the executor has omitted to make such settlement, or left it out of his administration account for any cause, then the other may, indeed must, proceed to collect or pay, in other words, administer the claim or demand. If *William Coleman* and his co-executor administered the two thousand five hundred dollars, then the administrators *de bonis non*, could not interfere with, nor touch the matter. And so, I understand, the court below stated the law to the jury; at the same time leaving the facts arising on the evidence on these points, entirely to the decision of the jury. In this there was no error.

In considering the seventh bill of exceptions I have already said, that the answer of the court to the fourth point was correct, and it was therefore only necessary to declare, that there is no cause for reversing the judgment on this ground.

The answer of the court to the *fifth* point was correct. It is

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true where money is paid to one, without fraud or unfair practices, the party who receives it, may in good faith and conscience retain it, although he could not have recovered it by law. The law is so laid down in innumerable cases; but here there was no such payment to the bank as has been stated, in considering the seventh bill of exceptions. The bank could not enforce against Mr. Jacobs the payment of this check, and as it was not actually paid to the bank, nor according to the opinion of the jury, who had to decide the fact, allowed in any settlement, to the bank, I think the bank cannot, in equity and good conscience, retain the money, and that this case does not come within the decisions cited by the counsel for the plaintiffs in error.

The sixth, seventh and eighth answers have been considered and declared not to be erroneous. They need not again be considered. This then disposes of all objections made to the charge of the court. One more error remains to be adverted to. It is contended that there is a misjoinder of counts in the declaration filed in the cause, and that the general verdict rendered thereon is, therefore, erroneous. The first count lays the indebtedness to the testator *Samuel Jacobs*, and a promise to him, in his life-time, to pay him the sum of money. The second count lays the indebtedness to the administrators, and the promise to the administrators to pay them, &c. There is a general judgment on both counts. I should not be disposed to reverse the judgment on this ground, after a full and fair trial on the merits, unless it were clearly required by some principle of undoubted applicability; but there is no such principle; on the contrary, this court, in the case of *Stevens v. Gregg's Administratrix*, 10 *Serg. & Rawle*, 234, has in fact, decided that counts like these may be joined, and has given the true guide in the following plain and intelligible direction, that "wherever the funds to which the money and the costs are to be applied, or out of which the costs are to be paid are the same, and the money when recovered, would be assets, then the counts may be joined." See 16 *Serg. & Rawle*, 242, to the same point. In this case the money, if recovered on either count, is assets, the plaintiffs look for nothing in their own individual right, but declare in their representative character, and the counts may, therefore, be legally joined. The judgment must, in the opinion of a majority of the court, be affirmed.

Judgment affirmed.



1 PW 188  
27 SC 415

**ROBERT KING and WIFE, appellants, against SAMUEL MORRISON, administrator of JAMES MORRISON, deceased, appellee.**

J. M. obtained patents for his real estate, and executed to the common-wealth mortgages for the purchase money, and died: administration upon his estate issued to his son. The real estate was divided, appraised, and taken by the son, and the other children, in purparts of unequal quantity and value. It was valued at its full value, without any deduction on account of the purchase money. The administrator paid the purchase money out of the personal estate.

*Held*—That the payment was a good one, and the administrator entitled to a credit for it.

Where personal estate is appraised, and a part taken by the heirs at the appraisement, and a part sold at an advance upon the sum at which part was appraised, the administrator will not be charged with a proportional advance on the goods retained; without any evidence that the goods retained were of greater value than their appraised price.

*Query*.—Under what circumstances should an administrator be charged with an advance on goods so taken?

J. M. died in 1810, having in his possession a bond on his brother D., given in 1794, which came to the hands of the administrator, who with D. in 1811, although the cause of action exceeded \$100, entered, before a justice of the peace an amicable action, and referred all matters in variance to referees, who reported in favour of D.; from this the administrator appealed. In 1814, the Supreme Court decided, that a justice had not jurisdiction by amicable action, and reference, where the cause of action exceeded \$100. This decision was published in 1818; the appeal was then quashed: D. obtained judgment by *scire facias* reviving the original judgment in his favour before the justice. To this the administrator issued a *certiorari*, reversed the judgment for want of jurisdiction in the justice, and to the next term, in 1820, brought suit on the bond and recovered judgment.

D., who in 1810 was solvent, when judgment was rendered against him had become insolvent, and the debt was lost. By referring to the record of the proceeding in court, it appeared the administrator had eminent counsel.

*Held*—That although the proceeding before the justice had been a mistake, the administrator was not liable for the debt which had been lost.

There is no case where trustees have acted with good faith, and under the advice of counsel, in which they have been held responsible.

J. M. left a slave of advanced age, who by the advice of appraisers, and family, was not appraised, and lived with family till they separated, and with widow until her death, and since that lived with administrator. At the time of the account taken, 1827, she was of no value, and the administrator agreed to keep her during her life. *Held*—That under the circumstances of the case the administrator was not chargeable with the value of her services.

This was an appeal from the decree of the Orphans' Court of Lancaster county, passing and confirming the administration account of *Samuel*, administrator of *James Morrison*, deceased.

*James Morrison*, died in December, 1810, seized of a large real, and possessed of considerable personal estate. In his lifetime he had procured patents for his land, and executed to the State two

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mortgages for the purchase money, &c. Administration on his estate was committed to his widow, *Eleanor*, and his eldest son, *Samuel*, the appellant, (who survived his mother,) in March, 1811. An inventory of the personal estate was filed, a part of it was taken by some of the heirs, and a part sold by the administrator, who filed a vendue paper, from which it appeared there was a considerable advance on the property sold.

In 1811, a proceeding was had in the Orphans' Court upon the real estate, in which it was divided into six parts; and appraised at its full value, making no deduction for the money due for patenting the land. The purparts into which it was divided were unequal in quantity and value. *Samuel*, the eldest son, and the administrator, took the largest and most valuable purpart: three others were, at the same time, taken by three other of the children of the intestate. Of the two parts which remained, one was taken, in 1812, by another child, and the other by the appellant, in right of his wife, in 1817. Several of the children were minors at the death of the intestate, and among them the appellant's wife, who was married to appellant in 1817. The family lived together at first, but removed as they severally got married. The widow died in 1827.

*James Morrison*, at the time of his death, held a bond on his brother *Daniel*, given in 1794, which came into the possession of the administrators, and which, at the time the inventory was taken, was admitted to be just by *Daniel*. In 1811, an amicable action was entered before *David Montgomery*, Esq. a justice of the peace, by the administrators and *Daniel Morrison*, and all matters in variance referred to referees. The referees reported three hundred and twenty-six pounds eighteen shillings and seven pence, in favour of *Daniel Morrison*, and the justice, on the 11th day of January, 1812, entered judgment on their report; from which, on the 13th of January, the plaintiffs, the administrators, appealed to the court of Common Pleas.

In 1814, the Supreme Court of the State, in the case of *Brennen v. Greenawalt*, decided, that the fourteenth section of the hundred dollar law, does not authorise a reference to men, in a suit before a justice of the peace, where the sum in controversy exceeds one hundred dollars. This case was published in 1818, in the first volume of *Serg. & Rawle*, page, 27. On the 16th June, 1818, the appeal, in the case of *Morrison's* administrators against *Daniel Morrison*, was quashed.

*Daniel Morrison*, obtained a *scire facias* to be issued, by the justice, upon the judgment in his favour, on which, in June, 1819, judgment was entered. To this judgment, the administrators issued a *certiorari*. The judgment was reversed on the ground of a want of jurisdiction in the justice: and the administrators, to

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September term, 1820, brought suit on his bond, against *Daniel Morrison*, and recovered a verdict and judgment against him for two thousand nine hundred and fifty-three dollars and eighty-five cents.

*Daniel Morrison* was in good circumstances, but having, on the 3d of June, 1812, sold his land in Lancaster county for eight thousand dollars, he afterward became insolvent, so that when execution issued against him, on this judgment, but one hundred and seventy-three dollars was made.

It was in proof, by the record, that the administrators in this controversy with *Daniel Morrison*, had able counsel.

Several administration accounts had been filed—the first in 1816, the second in 1820, (in each of these the widow was one of the accountants,) and a third in 1827, by *Samuel Morrison*, as surviving administrator. References to auditors had taken place in the controversies with the administrator, *Samuel*, who was the acting representative of the estate; and reports had been made in different stages of the business, one of which had never in any way been returned, or made a part of any proceeding in court.

As neither of the two first accounts purported to be a final settlement of the whole estate, nothing was considered as concluded; and in May, 1829, the whole matter was referred to auditors, to re-examine each of the accounts, and report on each.

The auditors made a report, which being confirmed, was brought by appeal, into this court, and the following exceptions here taken, and relied on,

1st. That the administrator should not have been credited with the sum of one thousand three hundred and ninety-seven dollars and sixty-five cents, paid by him to the State, for patenting the land.

2d. That he should have been charged with an advance on the goods taken by the heirs at the appraisement.

3d. That he should have been charged with two thousand nine hundred and fifty-three dollars and twenty-one cents, (and interest thereon,) the amount of the judgment recovered against *Daniel Morrison*.

4th. That he should have been charged with the value of a negro woman, (the property of the intestate,) who had not been included in the inventory.

*Montgomery and Porter*, for the appellant.

1st. The administrator should not have been credited with the amount paid by him for patenting the land. The trust, conferred by administration, is confined to the personal estate; the form of the bond given by the administrator, for the faithful discharge of his duty, refers to that alone.

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An administrator is not entitled to credit in his administration account, for any money expended on account of the real estate, or the maintenance of the children. *McKinney v. Barber's Administrator*, 8 Serg. & Rawle, 347.

Under the intestate laws, debts due to the commonwealth, are to be last paid: but here the administrator reversed the order and paid this debt; and suffered other debts to remain and interest to accumulate on them.

The purchase money due to the commonwealth is a charge on the land, and not personal; and is expressly decided not to be payable by executors out of the personal assets. *Helfenstein, administrator of Waggoner v. Waggoner*, 13. Serg. & Rawle, 307.

Nor is it just that the personal estate should be so applied, ~~for~~ here the children of the intestate took unequal shares of the real estate, and the discharge of this debt out of the personal estate, will therefore operate unequally; giving the greatest advantage to Samuel, the appellee, who has the largest purpart of the land. It cannot, too, be endured that the personal estate should be swept from the widow, who is a favorite of the law, to exonerate the real estate.

2d. They contended that the administrator should be charged with an advance on the goods retained by the children, which should have been ascertained by calculation; and should be in proportion to the advance of sales on the goods actually sold.

If an executor omit to sell goods, he is answerable for their full value. *Toller on Ex.* 427.

Any other doctrine would open a door to fraud; permitting the administrator, after the appraisement, to select such articles of personal property as he might find to be worth more than the amount of their valuation.

3d. The negligence of the administrator, is the ground on which he ought to be charged with the bond due by Daniel Morrison. The negligence of which he has been guilty is *supine* negligence, of the grossest kind. He is bound by his duty, as administrator, to collect the debts due the estate, and settle his account, within one year, from the time administration is granted to him.

Here, years are suffered to elapse before he brought suit, and the consequence is the loss of the debt. At all events he should have secured the debt by obtaining judgment upon it.

He derives no protection from the proceeding before the justice of the peace. That proceeding was *coram non iudice*, and a mere nullity. But besides, it was a voluntary submission to reference, from which, if a loss ensued, he is bound to bear that loss. *Toller, on Ex.* 424. He ought to have sought the ordinary forum, which alone could ensure his safety from responsibility. Here too, after

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the decision in the case of *Brenneman* and *Greenawalt*, he might have discontinued his appeal, brought suit, and secured the debt.

If an administrator delay to bring suit on a bond, he is liable.

*Gordon's Law of Decedents*, 264.

4th. They contended that the administrator should be charged with the services of the negro woman, who had resided with the family: that the appellant was married in 1816, and had not participated equally in the benefit of those services.

*W. Hopkins* for the appellee, referred to the cases of *Buckley v. Ellmaker*, 13 *Serg. & Rawle*, 76. *Harker v. Elliott*, 7 *Serg. & Rawle*, 284, and argued—

1st. The debt due the commonwealth for patenting the land, was a debt by mortgage, created by the intestate, which he was bound to pay. It is a debt by specialty, and must be paid out of the personal estate, although there be no bond or covenant to pay it. *Gordon on Decedents*, 175. *King v. King*, 3 *Peer. Williams*, 358.

In the order of paying the debts of decedents, bonds and specialties are in the fifth class. *Purdon*, 376, 14th sect. act of 19th April, 1794.

But this order applies only to cases of deficiency of assets, which does not exist here, and if it did, the mortgage would place it in the class of specialties and to be paid out of the personal estate. In the case of *Helfenstein's Adm'r v. Waggoner*, there was no mortgage, and this constitutes the distinction between that case and this.

Interest was chargeable on the debt due to the commonwealth, and therefore there was no difference, in this respect, between the payment of this debt and any other.

2d. It does not follow because there was an advance on the goods sold, that there would have been an advance on the goods retained by the family. These goods are usually such as do not sell well; consisting, for the most part, of second hand household furniture.

3d. *Daniel Morrison's* bond was not put into the inventory of the estate. At the time the inventory was taken, the heirs acquiesced in not putting it into the inventory, as is proved by a witness examined. *Hurt v. Ten Eyck*, 2 *Johns. Ch. R.* 80. *Orr v. Kaines*, 2 *Vesey*, 194.

A trustee is not chargeable with imaginary values, or more than he has received, unless guilty of gross negligence, amounting to wilful default. A trustee is not responsible for an error of judgment. *Osgood v. Franklin*, 2 *Johns. Ch. R.* 27. So where a trustee goes by the advice of counsel, and acts with good faith, and where the confidence reposed by him was the same as that which had been extended by the intestate, he is not liable.

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It may have been an error of sharp-sighted judgment, but for this a trustee is not answerable. *Thompson v. Brown, 4 Johns. Ch. R. 619, 26, 27.*

The bond was given by *Daniel*, to his brother in 1794, and was not sued by him up to the time of his death, in 1810; so that the administrator did but continue the ancestral confidence, which had been reposed, by his father, in his uncle.

But the administrator did seek a judgment. *Daniel* claimed a large set off, and by mutual consent the amicable action was entered before the justice; and the matters in controversy submitted to reference. Under the act of 1810, giving jurisdiction to justices of the peace, it was generally supposed, at the bar, that a justice might, under the fourteenth section, entertain jurisdiction of a cause of action, exceeding one hundred dollars in this way. This impression was not ascertained to be erroneous, until the case of *Brenneman v. Greenawalt* was decided; and although this case was decided in 1814, it was not published until 1818, and did not, until then, become generally known to the bar.

During all this time, the proceeding instituted before justice *Montgomery* was pending, and could not, owing to the great amount of business in the court of Common Pleas of Lancaster county, be disposed of: and, during all this time, the administrator proceeded by the advice of counsel.

When the case of *Brenneman v. Greenawalt* became known, the appeal was quashed; but the judgment before the justice in favour of *Daniel Morrison* remained unreversed; nor could this be effected until he chose to proceed on it: for no *certiorari* could be issued after twenty days from the rendition of that judgment.

But so soon as *Daniel* obtained a judgment, on the *scire facias*, which he caused to be issued, the administrator issued a *certiorari*, reversed that judgment, and having thus removed every difficulty growing out of that proceeding, he brought suit on the bond, and obtained a judgment. If then there were error on the part of the administrator, it was an error of judgment, there was no *lata culpa*, and it is clear that for an error of judgment he is not liable.

4th. The negro woman lived in the family. By the consent of the parties, she was not included in the inventory, and each of the children had a proportion of benefit from her services.

*Reply.* The mortgage given for the purchase money, of the land to the commonwealth, does not differ the case. It did not change the nature of the debt, it but merely added a more formal security, and ascertained the amount of it.

It does not follow because the debt due by *Daniel Morrison* was not put into the inventory, that therefore the administrator is not chargeable with it. It is not the general practice to put debts into the inventory. There is no proof that counsel were ever

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consulted, as to *instituting* the proceeding before the justice. If such had been the fact, it should have been proven by the testimony of the counsel who were employed.

Had he brought a suit in court, he would have secured a lien, which could not be effected by the proceeding before the justice.

The case in 2 *Johns. Ch. R.* is of a desperate debt, and that in 4 *Johns. Ch. R.* is of a partner, in whom confidence was placed as such.

The estate will be liable for the support of the black woman, and the administrator should be charged as respects us; for the appellant derived no advantage from her services.

The opinion of the court was delivered by

HUTSON, J. (who recapitulated the facts of the case.)—1. The first exception is that the accountants claimed, and were allowed, a credit of one thousand three hundred and ninety-seven dollars and sixty-five cents, for patenting the land of the deceased. An act of assembly, passed in 1785, had allowed those persons whose lands were unpatented, to obtain a patent, on giving to the State a mortgage for the purchase money remaining due. *James Morrison*, in his lifetime, had, under this law, taken patents for his land, and given two mortgages to the commonwealth for the purchase money in arrear. It appeared fully in evidence, that respectable counsel had advised the administrators, that they must satisfy these mortgages; and further, that the inquest, which divided the lands, were apprised of this, and estimated them at so much per acre, clear of these mortgages—all inquests in such cases do so. It cannot be pretended that there was any injustice in paying the mortgage money to the State—for it being added to the price of each parcel, and the amount of the several purparts added together, making the sum total, to be equally divided among the heirs, it is most apparent each child bore an equal part of this.

But 8 *Serg. & Rawle*, 347, is cited, in which the court say, the administrator had no right to a credit for money expended on account of real estate. In that case, the widow, who had married again, had kept possession of the farm, and yet charged the children two thousand dollars, for improvements, during about eleven years, being much more than the rents. This was disallowed. There is no question the case was decided rightly—but the expression could not have been used as universally true: for the nineteenth section of the general act concerning intestate's estates, expressly authorises the administrators, to borrow on mortgage, (giving the premises for security,) any sum of money, not exceeding one-third of the value thereof, or to sell and convey such part or parts of the said lands, as the Orphans' Court of the county where the lands lie, shall in either case, from time to time, think fit to

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allow, for defraying just debts, maintenance of the children, putting them apprentices, teaching them to read and write, or *for the improvement of the residue of the estate, if any be, for their advantage.* Now this is to be done, in case there is no personal estate; if there is personal estate, it would seem the same may be done with it: and whatever the law directs administrators to do, may be, and must be put into an administration account. But the account ought to shew the debts to be paid, before any allowance to improve the land, or at least that there will be enough with which to pay them. In this case this was a debt, and peculiarly proper to be paid: for as each mortgage covered about four hundred acres, and that was divided and taken in unequal quantities, and at different prices, it would have been difficult to apportion the sum each was to pay on the mortgage. The mortgage is a debt of the intestate, and to be paid with the personal estate, in case of intestacy, if administrators can pay it. 3 *Peer. William*, 358. In this case, under the circumstances, there was no error in allowing this credit.

2d. exception. The auditors erred in not charging an advance on the personal estate, taken by the heirs at the appraisement. On that part of the goods sold, there was an advance. And if it had been proved that the articles taken at the appraisement, had been sold by those who took them, at an advance, this advance ought to be charged to each heir who took them at such appraisement; but there is no such proof, nor any proof that either of the administrators took any article at the appraisement. The family lived together until they successively married. In such case certain articles are necessary to be bought, or taken at the appraisement. There is no proof how they were divided at the death of the widow, or as each child separated. There was no exception at the time the first or second account was settled, as to this matter, and we see no evidence, which, at this time, would justify us in supporting this exception, more especially, as it appears to us that this item is, by a mistake, really charged twice in the account, and credited but once.

3d. exception. The auditors have erred, in not charging the administrators with two thousand nine hundred and fifty-three dollars and twenty-one cents, being the amount of a bond and interest which the intestate held on *Daniel Morrison*, and which was lost by negligence of the administrators. This is an item of serious amount, and was really lost to the estate; and a witness proved that it might have been collected at the death of intestate, or rather that *Daniel* was able at that time to pay it, and promised to pay it when he sold his land. By the bye, this witness was at one time an arbitrator on one of these accounts, and then allowed a credit for it.



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By the fourteenth section of the act of 20th March, 1810, it is provided, that any justice may take cognizance of any thing made so by this act, for any sum exceeding one hundred dollars, if the parties voluntarily appear before him for the purpose; and shall proceed for the recovery thereof, by entering judgment if confessed, or if submitted to him by reference. This was understood to mean if the parties instituted a suit voluntarily, and referred it to arbitrators chosen by themselves, and the justice entered judgment on the award. It was known before, that parties might refer at common law to arbitrators, and were bound by the award; but they often had to sue on the award, and it was supposed that the judgment on the award, by the justice, came in place of an action of debt on the award. In many parts of the State, much was settled in this way. Under this impression, the administrators and *Daniel Morrison*, submitted their claim, on this bond, to three arbitrators, before a justice. This was in the summer of 1811. *Daniel* set up a defence as to the whole, and more; and an award was made in his favour for three hundred and twenty-seven dollars, and judgment entered for him. The administrators appealed to court. Two eminent counsel were employed by them. The business in court in this county was greatly in arrear, and a special court appointed, in addition to the regular court, have not yet brought up the business. In 1814, the Supreme Court decided, that such proceedings, before a justice, were illegal and void. This decision was not published, or generally known, until 1818. *Brenneman v. Greenawalt*, 1 *Serg. & Rawle*, 27. Soon after this, the appeal was struck off the docket, and *Daniel Morrison* issued execution. The administrators took out a *certiorari*, and reversed the proceedings:—and before the next term brought suit in court, and recovered; but *Daniel Morrison* had become insolvent, and the debt was lost. There was no delay in any part of the proceedings, but the proceedings were unfortunately mistaken. It is believed there is no instance where trustees have acted with good faith, and under the advice of counsel, (and here they had eminent,) in which they have been held responsible. 4 *Johns. Ch. R.* 619. It is an unfortunate business; but one in which there was neither negligence nor fault. The mistake in the proceeding was not peculiar to them, or to this district. In the district in which I lived, such proceedings were common, and no lawyer questioned their legality, before the case above cited.

4th. This exception embraces several small items, which the referees on the second account had charged to the administrators. No evidence was before us to shew why these charges were made, and as that report was waived by the present submission to auditors, we do not see how we can decree the administrators to pay those sums. That report had not been confirmed by the court.

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The bare fact, that one set of auditors made those charges, is met by the fact, that the present auditors rejected them, and without some evidence of their justice, we cannot say the administrator must pay them.

There is another item under this fourth error: *James Morrison* left, among other property, a negro woman, a slave. The proof is, she was of an advanced age, was (by the advice of the appraisers and the family,) not appraised; she lived with the family as long as they lived together, and with the widow, till the widow's death, and since that has gone to *Samuel*. No exception on account of this woman, was made to either of the two first accounts. The objection is now made by the husband of the youngest daughter, who was a minor at the time of the appraisement. She however married about 1816 or 17, and her husband made no objection then, nor when the second account was filed. Where a family have made arrangements for their own convenience, or that of their mother, and have acted on that arrangement so long as from 1811 till 1827, without objection, an objection then taken, appears harsh. I do not say such objection will never be sustained in court, but it must be a substantial one to have effect. Minors will not be bound by arrangements by the elder branches of the family, where they are for the exclusive advantage of the latter, and unjust to the minors, but the objection ought to be made in some reasonable time. In the country, where the female part of the family do the work of the house, the daughters derive as much benefit from the labour of a female slave, as the sons; perhaps a little more. *Samuel* had, perhaps, the least of the whole family; and as no complaint was made until after the death of the mother, there is little, if any, ground for charging him, with what was of more benefit to the wife of the complainant, than to *Samuel*: she is now of such an age as to be of no value, and he agrees to keep her during her life. Much respect is paid to family arrangements, if just and reasonable, and especially if long acquiesced in. There are two other exceptions not insisted on, and we confirm the report of the auditors' so far as it is before us.

Decree affirmed.

TON, J., dissented as to the advance claimed on the goods taken at the appraisement. This he thought ought to be calculated and charged: and also as to the payment of the mortgage to the State, which he thought ought not to be credited out of the personal estate.

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ABRAHAM DONER, SAMUEL HERR and SAMUEL HOWRY, *against* JOHN STAUFFER, CHRISTIAN BRECKBILL and JACOB ESHELMAN.

IN ERROR.

1172.199.  
In a case of partnership, the joint effects belong to the firm, and not to the partners, each of whom is entitled only to a share of what may remain, after the payment of the partnership debts, and no greater interest can be derived from a voluntary assignment of his share, or a sale of it on execution.

A preference exists in favour of the joint creditors of a firm, founded on no merits of their own, but on the equity which springs from the nature of the contract between the partners themselves.

With the single exception of a joint commission, whenever the partners are not individually involved, the joint creditors have no preference.

A separate execution creditor sells not the chattels of the partnership, but the interest of the partner encumbered with the joint debts; and the joint creditors have therefore no claim to the proceeds.

Where the separate creditors of each partner precede by execution, the sale of the partnership effects, under the execution of the separate creditor of one partner, passes the interest of that partner subject to the equity of his co-partner, and the execution creditor is entitled to the price. This equity, together with the remaining interest of the other partner passes by a sale under execution of his separate creditor, where the purchaser of the effects is the same: and this whether the sales be made consecutively, or at the same time.

*Query.*—What would be the effect where there are separate purchasers of the shares of the respective partners.

WRIT of error, to the court of Common Pleas of Lancaster county.

This was a feigned issue, directed by that court, and joined between the defendants in error, who were the plaintiffs below, (and for whom the verdict past,) and the plaintiffs in error, who were the defendants below.

It appeared from the evidence in the cause, that *Daniel Howry* and *Benjamin B. Eshelman* entered into partnership in a manufacturing establishment, under the firm of *Howry and Eshelman*. They became considerably indebted. Judgments were entered and executions were issued against each of them. *Abraham Doner*, *Samuel Herr*, *John Howry* and *Samuel Howry*, had severally judgments against *Daniel Howry*, on each of which an execution issued against him, and was levied on the 9th of August, 1825, on the personal property of *Daniel Howry* and *Benjamin B. Eshelman*, as partners in trade.

*John Stauffer*, *Christain Breckbill* and *Jacob Eshelman* had severally obtained judgments against *B. B. Eshelman*, on each of which judgments, an execution was issued against him and levied on the 11th day of August, 1825, on *Benjamin B. Eshelman's* share of the

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personal property of *Benjamin B. Eshelman* and *Daniel Howry*, as partners in trade. By virtue of these and other executions, the personal property of the firm was sold for the sum of five thousand and seventy dollars and thirty-nine cents, which after payment of the costs, left a balance of four thousand seven hundred and seventy-nine dollars. This balance was paid into court for distribution.

On a rule obtained by the counsel of *Stauffer, Breckbill* and *Eshelman*, to shew cause why the one half of the proceeds of the sale of the firm property, should not be applied to the satisfaction of their executions against *B. B. Eshelman*, the court decided, that the execution creditors of *Benjamin B. Eshelman*, had a legal right to his share of, and interest in the partnership effects of the firm of *Howry & Eshelman*, as it stood on the 11th August, 1825, when the executions were levied; and directed this issue, to try what that share or interest was.

The plaintiffs claimed a moiety or half part of the four thousand seven hundred and seventy-nine dollars; as their share.

The plaintiffs having closed their evidence: The defendants in support of the issue taken in the cause, offered to prove, that the firm of *Howry & Eshelman* was entirely insolvent on the 11th August, 1825. That the debts and claims against the said firm existing on the said 11th August, 1825, which were then unpaid, greatly exceeded the whole property of the said firm. That *Benjamin B. Eshelman*, on the said day, had no interest whatever in the said firm, and that *Daniel Howry*, the other partner, is greatly interested in the application of the funds of the said firm, to the payment of the debts of the said firm, as he is answerable, individually and as a partner, for the whole of the said debts. Which offer being objected to, the court overruled the same, and delivered the following opinion, to wit: "I am satisfied that the authorities cited settle the law as it applies to the cases decided, that is to say, to cases where there are separate executions against one partner levied on the partnership effects. But this is a case where the whole partnership effects are swept away by separate executions against each partner, where the creditors at large have no lien. I must say that the principal object in directing this issue was, as it was a case of great importance, to give an opportunity of completely considering and reviewing the law on the subject. But I am very clear that *Benjamin B. Eshelman's* interest, or want of interest, cannot be shown by evidence of debts due from the firm, and that the testimony offered relative to the insolvency of the firm, and the interest of *Daniel Howry* in the application of the funds of the firm to the payment of its debts, cannot be admitted."

To this opinion, overruling the evidence offered, the defendants excepted.

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Although the issue joined was between the separate execution creditors of the respective partners, the counsel for the defence appeared for the joint creditors of the firm, to controvert the right of the separate creditors of *Eshelman*, to be paid out of the fund in court, before the joint creditors were satisfied: and they alleged, that after the executions of the separate creditors were levied, *Howry & Eshelman* had made an assignment to trustees, for the benefit of the creditors of the firm.

The only question now raised in this court, upon the charge of the court below, and the bill of exception, was, whether the separate execution creditors of *Eshelman*, had a right to be paid out of the proceeds of the sales of the goods of the firm, before the joint creditors were satisfied out of that fund.

*Norris*, for the joint creditors, denied that the separate execution creditors had a right to the fund in court, for appropriation. The separate creditor cannot withdraw the funds of the partnership, from the payment of the partnership debts to pay his debt. Accounts must be settled between the partners and the world, and one between the partners themselves, before such creditor can have the fruit of his execution; he comes in only for the surplus after paying the partnership debts.

Partners have a lien on the partnership effects, creditors have not. No spark of interest can be drawn from the firm, by one partner, until the partnership is settled. The partnership fund is pledged for the payment of the partnership debts. The only interest which each partner has, is what remains after the debts are paid; it is the dry mass of property, after the payment of the partnership debts.

This then being the interest vested in *Eshelman*, the plaintiffs below, the separate execution creditors, could take no greater interest, and therefore the joint creditors must be first paid. *West v. Skip*, 1 *Vesey*, 293. *Id.* 244.

The vendee, is a tenant in common with the surviving partner. *Fox v. Hanberg*, *Comper*, 445. *Pearce v. Jackson*, 4 *Mass. Rep.* 242. *Taylor v. Fields*, 4 *Vesey, Jr.* 396. He also referred to, *In the matter of Smith*, 16 *John. R.* 102, and the note to that case, where, the cases on the subject of the proceeding under an execution, in favour of a separate creditor, levied on partnership effects are collected. *Nichol, et al. v. Munfort*, 4 *John. Ch. R.* 522. *Id.* 525. *Edy v. Davidson*, *Douglass*, 650, decides, that the sheriff should pay a part of the money levied on the execution of the separate creditor, out of the partnership effects, to the assignee, representing the partnership creditors equal to the amount of the interest of the partnership in those effects. This case is precisely in point. *Gow on Partnership*, 49. *Id.* 317. The right is a lien in favour of part-

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ners, *Watson on Part.* 103. *Bank of North America v. McCall*, 3 Bin. 338.

An action may be brought by a surviving and solvent partner, to recover money obtained by a separate creditor, out of partnership effects. *Bank of North America v. McCall*, 4 Bin. 371. *Nox v. Summers*, 4 Yeates, 477. The general doctrine is recognized in this case, and here money was made on a separate execution against one partner, and brought into court, and claimed by the assignees of the partners, on a subsequent execution, and the court decreed the money to the assignee. He referred also to *McCarty v. Emlen*, 2 Yeates, 190. Chancery will not stay the execution of the separate creditor, until the partnership debts are taken and liquidated. *Moody v. Payne*, 2 John. Ch. R. 548. *Kuhn v. Nixon*, 15 Serg. & Rawle, 118, 125. *Caldwell v. Stileman*, 1 Rawle, 212, 16.

The fund, is by law, appropriated to joint creditors, and the separate creditors must show that they are satisfied, before such separate creditors can come at it.

This preference of the joint creditors, as to the partnership effects, is the well settled law of Pennsylvania. The lien of the partner, upon these effects, which gives this preference, arises from the contract of partnership. They are mutually bound, on that contract, for the joint debts of the firm, and if the separate creditor of one partner, could sweep the partnership fund away, great injustice would result to the other partner. His liability to the joint creditors would remain, while the joint property, in which he had an equal interest, would be taken to satisfy the debt of his partner; in which he had no interest, and for which he was in no way liable. All this is prevented by the principle of natural justice, which gives the lien to the partner, and secures the effects to the joint creditors. This does not depend on the bankrupt law, nor is it derived from the system which in England has been adopted under it. That law is silent as to any preference. It arises from natural equity, growing out of the contract of partnership, and is said to exist at common law.

The sale in our case was *in invito*, against the consent of the owner of the goods. It is a transfer by operation of law. The sheriff must, under the separate execution, seize the partnership effects, for the partners are seized *per mi et per tout*, and the interest of each cannot be separated. *Watson*, 98, 72.

The courts of law in Pennsylvania, as we have here no courts of equity, are bound to enforce the equity arising in the relation of partnership between the partners. *Bell v. Newman*, 5 Serg. & Rawle, 78.

Where the land of an intestate is sold by execution, the money is to be distributed according to the order of payment of debts, in the case of personalty, and the court from which execution issued

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is bound to distribute it. *Bank v. Stambaugh's Adm'rs*, 13 Serg. & Rawle, 299.

In the case of *Edy v. Davidson*, the same equitable doctrine was applied to the distribution of money, levied out of partnership effects.

The mode adopted to exercise the equitable jurisdiction, in this case, was a proper mode to effect the object. It is in effect between the partners, although nominally between the separate creditors of each partner. But it is a feigned issue, and no matter who are nominally on the record, the substance is to try the right between all parties.

The mode of these feigned issues is not the subject of error. They are to inform the conscience of the court, and the substance only is regarded. *Neff v. Barr* 14 Serg. & Rawle, 166.

It is not necessary that there should have been an execution in favour of the joint creditors. Their right does not depend on this, but on the lien in favour of the partners.

The court declined hearing *Parke* and *Montgomery*, for the defendants in error.

*Hopkins* for the plaintiffs in error.

The money came into the court by wrong: the whole effects, not merely the right to the surplus after the payment of the partnership debts were sold; although the sheriff could of right sell but that surplus. *Hankey v. Garrett*, 1 Vesey, 242. *West v. Skip*, Id. 456. *Taylor v. Fields*, 4 Vesey, Jr. 396.

Enough must be left for partnership debts. When the sale took place the partnership was gone. *Pierce v. Jackson*, 6 Mass. Rep. 212. *Cooper v. Chitty*, 1 Bur. Rep. 20. *Shaw v. Tunbridge*, 2 W. Black. 1064.

Here the entire fund was brought into court for distribution among all parties in interest.

A motion to distribute a fund, in Pennsylvania, is in the nature of a bill in equity, and comes instead of the *audita querela*, which has fallen into disuse. It expands itself to embrace all questions involved, and all the parties in interest. The joint creditors had a direct interest, represented by the assignees of an insolvent partnership. Their interest, and that of *Daniel Howry*, is identified; and if these creditors so represented, do not recover this fund, their rights must be destroyed. The fact that the assignment was made subsequent to the execution, can have no effect. The assets of the partnership are in *gramio legis*, until they can assert their rights.

The issue directed *ex vi termini*, embraces the question as to the joint creditors, as upon the settlement of the accounts of the firm only, can the share of *Eshelman*, in the partnership fund be ascertained.

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What is the mode of investigation where the funds of a partnership are in court for distribution?

In chancery, where a court of chancery exists, an injunction would issue to stay proceedings at law, and distribution would be made in that court so as to do equity. Lord *Mansfield*, however, thought that where the common law court was in possession of the fund, a resort to a court of equity was unnecessary; but that the common law court should distribute it according to equity. Here our courts are armed with equitable as well as legal powers, and they have long ago broken legal trammels, and asserted principles necessary to do equity and justice. *Est boni judices ampliori jurisdictionem.* *Edy v. Davidson, Douglass*, 650. *Bank v. Stambaugh's Adm.* 13 *Serg. & Rawle*, 299. In this case the funds were brought into court upon execution, and the court, to do equity, investigated the rights of parties under the fourteenth section of our law relating to intestacy, and decreed in favour of a bond creditor, as to the fund so raised; although the bond creditor was no party to the execution, and had no judgment.

Where there are complicated rights, the court will, on the application of the sheriff, suspend proceedings until those rights can be ascertained, in order that the sheriff may make a correct return. *Shaw v. Tonbridge*, 2 *W. Black*, 1064. He referred also, to *Knox v. Sumers*, 4 *Yeates*, 477.

Where the separate creditor had actually obtained the fund under a judgment, yet he was not protected by it from the other partner. *Bank v. McCall*, 3 *Bos.* 371.

Where the claim is either by assignment, or under execution, it is only to the surplus after the payment of partnership debts. *Nicoll v. Mumford*, 4 *John. Ch. R.* 525. This case contemplates bringing the money made on execution into court, and overrules, in effect, the decision in 2 *John. Ch. R.* 548, as to an injunction to stay a separate creditor, in case of partnership effects.

The case of *Morley v. Stromborn*, in 3 *Bos. & Pull.* 54, is at law. In equity it is different, and it is so said in this case; and Lord *Mansfield* held, that the rule should be the same at law.

The opinion of the court was delivered by

GIBSON, C. J.—It is settled by a train of decisions in the American, as well as the British courts, that the joint effects belong to the firm, and not to the partners, each of whom is entitled only to a share of what may remain, after payment of the partnership debts; and consequently, that no greater interest can be derived from a voluntary assignment of his share, or a sale of it on execution. That a contract which enables the parties to keep a class of their creditors at bay, and yet retain the indicia of ownership, should not have been deemed within the statutes of *Elizabeth*, is at-



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tributable exclusively to the disposition universally manifested by courts of justice to encourage trade. But such as it is, has the contract of partnership been established; and the principle which enables the partners to pledge to each other, the joint effects as a fund for payment of the joint debts, has introduced a preference in favour of the joint creditors, founded on no merits of their own, but on the equity which springs from the nature of the contract between the partners themselves. The author of the *Commentaries on American Law*, vol. 3, page 88, attributes this preference to an inherent equity in the joint creditors themselves, arising from a supposed acquisition of the partnership effects from their means. The opinions of *Chancellor Kent*, are so justly entitled to deference, that no prudent judges will differ from him without hesitation; yet I cannot but adhere to the opinion I expressed in *Bell v. Newman, 5 Serg. & Rawls, 92*, that in cases of insolvency or bankruptcy, in which alone the question of priority can be material, the joint effects consist of the wreck of the capital originally embarked. Under a joint commission, by which the effects pass to the assignees, while the partners are personally discharged, I admit, that the preference of the joint creditors has no other foundation, if it has any at all, than this supposed inherent equity; and the best elementary writer on the subject so disposes of the difficulty. *Gow on Partnership, 341-2*. But in the case of a separate commission, *Lord Eldon* expressly puts it on the particular equity of the partners themselves, *Ex parte Ruffin, 6 Vesey, 126*, and in the case of an execution, *Chief Baron McDonald* does the same. *Taylor v. Fields, 4 Vesey, 306*. To secure the firm from the extravagance of its members, by preventing the capital from being withdrawn from the purposes of the partnership, the stock is pledged for the burthen which, from the nature of the connexion, is to be borne by all; but in moulding the law of partnership to its present form, the credit gained by giving the joint creditors a preference, was, if an object at all, a very remote one. Accordingly, with the single exception of a joint commission, we find that wherever the partners are not individually involved, the joint creditors have no preference whatever: as in the instance of a *bona fide* assignment of the effects, to one of the partners, after the partnership has been dissolved.

In consequence of the rule as I have stated it, a separate execution creditor sells, not the chattels of the partnership, but the interest of the partner, encumbered with the joint debts; and the joint creditors therefore have no claim to the proceeds. To allow them the proceeds, and recourse to the property in the hands of the purchaser, would subject it to a double satisfaction. Neither can they take the proceeds or the property at their election. They can interfere at all, only on the ground of a preference which has

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regard only to the partnership effects, and these have not been sold but only the subordinate interest of the partner, which was, strictly speaking, his separate estate. Their recourse, therefore, is necessarily to the property in the hands of the purchaser. Now had the sheriff sold the interest of but one of the partners, the execution creditor would have clearly been entitled to the proceeds. But although he sold the whole stock at one operation, as separate executions against both, there was, in contemplation of law, a separate sale of the interest of each. What then would have been the effect, had these sales been made consecutively? The first, in the order of time, would have passed the interest of the partner, subject to the equity of his co-partner, and the execution creditor would have been entitled to the price. But this equity, together with the remaining interest of the other partner, would have passed by the succeeding sale to the same purchaser; the execution creditor, in that instance, also taking the proceeds. Can it make a difference, then, that instead of being consecutive, these two sales were simultaneous? A curious question might arise whether separate purchasers of the shares respectively, would stand in the relation of partners, so as to enable the joint creditors to follow the goods. It seems to me they would not, because not personally involved in payment of the debts. Here, however, where the shares of the partners are united in the same purchaser, every semblance of partnership equities is at an end. As regards the goods in the hands of the purchasers, this is conceded; but the joint creditors insist that the proceeds are to be substituted for the goods, and subjected to the same equities. That might be done if the proceeds belonged to the partners; but it is not easy to imagine how they are to be treated as the owners of money raised by a sale on executions against them. For what purpose should the ownership of it be vested in them, even for an instant? Not to give the joint creditors a preference, for that would make the rights of the partners depend on the claims of the joint creditors, who on the contrary can claim nothing but by virtue of the lien, where there is one, of the partners. To say that the partners have such a lien because the joint creditors have an equity, and that the joint creditors have an equity because the partners have a lien, would be to argue in a circle. Here the partners cannot be prejudiced in respect of their claims on each other, the advantage to be gained from an application of the joint effects to their separate debts, being mutual and equal. The consequences are precisely the same, as if the effects had been sold on an execution against both. We are, therefore, of opinion that the joint creditors can not interpose; and consequently, that the rejection of the evidence, as well as the direction to the jury, was substantially right.

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I have considered the question on principles applicable to it, in analogy to well settled parts of the law of partnership, rather than on authority bearing directly on the point. But, since this opinion was drawn, my brother HUSTON has directed my attention to the case of *Brinkenhoff v. Marvin*, 5 Johns. Ch. R. 300, which is direct to the point; so that independent of analogies, we have an authority on which we might safely rule the cause. But both principle and authority are adverse to the preference claimed; and the issue, therefore, was correctly found for the plaintiff.

HUSTON, J., dissented.

ROBERTS, J., was sitting at Nisi Prius, and took no part in the judgment,

Judgment affirmed.

**BENJAMIN KONIGMACHER, guardian of JACOB KIMMEL,**  
**appellant, against JACOB KIMMEL, appellee.**

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B. K., in 1815, was appointed guardian of J.; shortly after, J. W., brother-in-law of J., and administrator of the estate of his father, settled his administration account, by which a balance was found in his hands. In 1816, B. K. received part of that balance in cash, and for the residue coming to his ward, took J. W.'s bond, without security. At that time J. W. was in good circumstances, he kept a store, and up to the year 1820, continued to have a large amount of real and personal property in his possession; then he sold a tract of land, which he had bought at a very high price, at a loss of about \$12,000, and shortly after, made an assignment for the benefit of his creditors, by which it appeared, that he was largely indebted. The assignees paid fifty-five per cent of his debts. Up to the spring of 1820, many of his neighbours, and among them, the mother, and another brother-in-law of J., loaned him different sums of money.

*Held*—That B. K., the guardian, was not chargeable with the loss upon the bond he had taken of J. W.

More ought not to be expected from guardians, than common prudential care; they should not be made liable, unless under unfavourable circumstances, their acts expose them to the animadversion of the law, for supine negligence, shewing carelessness of duty, and of the ward's interest: or where the loss is occasioned by their own act, in giving credit, without taking security.

If executor or administrator, sell goods of testator or intestate, and do not take security for the price, he is generally charged with the amount.

If the bail or security, is a man generally reputed good for so much, it is sufficient, it is not necessary that he should be a freeholder. So if a guardian has in his hands money of his ward, and put it out, he will generally be liable, unless he take surety in the note, &c. not so if he take a mortgage on land, and an old title, unknown at the time, should sweep away the property mortgaged.

But where the fund never actually came to the hands of the guardian, there is a difference; he is not bound instantly to sue in all directions, if to all appearance, the money is safe.

Common skill, common prudence, and common caution, are all that courts require from trustees.

In case of appeal from a decree of the Circuit Court, a *certiorari* is not necessary, nor can the prothonotary demand his fee before entering it.

This was an appeal from the decree of the Circuit Court, confirming the decree of the Orphans' Court, of Lancaster county, in the matter of the guardianship account of Benjamin Konigmacher, the appellant, as guardian of Jacob Kimmel, the appellee, charging the guardian with the amount of a bond given by John Weidman, to the guardian, on account of money due the ward, and which was lost by the insolvency of Weidman.

Upon breaking the case in this court, *Porter*, for the appellee, moved to quash the appeal, on the ground, that it had not been filed here in time. It appeared that the record of the appeal had been taken to the prothonotary in due time; but that he refused to receive it, because no *certiorari* had been issued in the case, and

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his fee of one dollar and fifty cents, was not paid. The court overruled the motion. A *certiorari* is not necessary, nor can the prothonotary demand his fee before entering the appeal.

The exception in this court, was, the charge to the guardian of the money lost by the insolvency of *Weidman*, and at all events, to the interest on it. The decree in the Circuit Court, was made without prejudice, and with a view to a decision by the Supreme Court.

It appeared from the evidence, that *Jacob Konigmacher* and *John Weidman*, were administrators of *Jacob Kimmel's* estate, and settled their administration account in the fall of 1815. *John Weidman*, was the son-in-law of the intestate, and on the settlement of the account, had in his hands, four hundred and seventy-six pounds four shillings and six pence. *Benjamin Konigmacher*, was appointed guardian of *Jacob Kimmel*, a minor son of the intestate, on the 25th of September, 1815, and on the 1st of April, 1816, received from *Weidman*, two hundred dollars in cash, and took his bond for the residue of his ward's share. The interest was paid on this bond, at the end of the first year, but no interest was paid after that time.

In the autumn of 1820, *Weidman*, made a general assignment of his property, for the benefit of his creditors, and the assignees had paid about fifty-five per cent of his debts.

The Orphans' Court, charged the guardian with the whole amount of the bond, and interest thereon, up to the settlement of his account.

The appellant examined twelve witnesses, ten of whom were creditors of *John Weidman*, and all but two of whom had lost by him. The other two had been clerks in his store.

The proof of all, was, that *Weidman*, had a farm, and kept a store; was considered perfectly honest, was managing well, sober, industrious and by all supposed to be growing rich. No one of these had asked security from him at the time of lending their money, nor had sued him. One, who was executor of another estate, had, shortly before his assignment, got a bond on another person from *Weidman*, in lieu of his own. Another had purchased a plantation from *Weidman*, and then became a debtor instead of creditor. Two of them had lent him money in 1819, and one in the spring of 1820. The men who had been clerks in the store, proved his character, and credit, up almost to the last. The mother of him who was clerk when he assigned, had loaned *J. Weidman*, two hundred pounds, and he did not think it necessary to warn her, that it was in danger; nor did she either sue or ask security. His failure was accounted for in this way; when property was rising and very high in this county, he purchased a tract of land, of sixty-one pounds six shillings and six pence, per acre. Property fell, and he offered it for sale—at length for sale at public

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vendue. On the 20th October, 1820, it was bid to ninety dollars per acre: *Weidman* thought it too low, and endeavoured to get a higher price, but finding he could not, he, on the 12th of November, closed with the bidder, and conveyed it. On examining his affairs, he found the loss on this single purchase, of about seventy-eight dollars per acre, had rendered him insolvent, and on the 17th of November, he made an assignment, as before stated. On that assignment was an exact list of all his creditors, and the amount due to each. The number was about thirty, and the amount exceeded fifteen thousand dollars. Many of these were bond creditors for money lent; not one of whom had asked for security at the time of the loan, nor had got it since, nor had sued him. The appellee examined the mother of the ward, two of his brothers-in-law, and took the depositions of four witnesses who had given them before, at the request of the appellant. The mother of the ward swore she had lent *Weidman* money, but never asked security—that after the sale of *Weidman's* land at a vendue, she told *Konigsmacher* to secure himself—that she wished her son's money left in *Weidman's* hands—that her grandfather never liked *Weidman*, but every body else spoke well of him—that she never believed he would fail. One brother-in-law proved, that he himself had loaned money to *Weidman*, and got secured about three weeks before he assigned; that he saw *Konigsmacher* and advised him to get security—but he met *Brubecker*, another brother-in-law, who told him *Weidman* was in no danger, and *Konigsmacher* said he would risk it. This was about the time of the vendue. He told *Konigsmacher*, he thought he could get from *Weidman*, bonds on *Barnhart*; he did not know who got those bonds; but *Barnhart* turned out to be insolvent. The other brother-in-law, who cross-examined all the witnesses on the part of the appellee, proved that he knew *Weidman* was in debt, the amount of his debts, and to whom due, in 1819: but he expressly said he never told this to any person, although he might have said he was much indebted—that he did not tell *Konigsmacher*. *Keller*, as representative of *Houk's* estate had got security, about the time of the sale; but he said it is disputed whether he will recover, it is still in law. He and *Hosker*, who lent *Weidman* two hundred pounds in 1819, said the credit of *Weidman* was not so good in 1820 as it had been. *Hosker* neither applied for security, nor sued; and on cross-examination they both fixed the time in 1820, when *Weidman's* credit failed, to be about the time of the vendue, at which he sold his land at such a loss.

*Hopkins* for the appellant.

A guardian is bound to exercise the same discretion and judgment, only as a prudent man would in his own case. *West v. Ship,*

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2 Vesey, 240. In order to involve a man who acts without interest as in case of a trustee or bailee, there must be gross default. *Palmer v. Jones*, 1 Vernon, 144. 2 Fonblanque's Eq. 180. *Osgood v. Franklin*, 2 John Ch. R. 1. 27-28.

He is not chargeable with imaginary values, or what he has not received, unless in case of gross negligence, amounting to wilful default; and courts will not strike a terror into such as act as trustees, by adopting a more rigid rule. *Bercher v. Parsons, Ambler* 219. *Thompson v. Brown*, 4 John. Ch. R. 619. 626.

Executors and administrators, acting with good faith, and not being in default, are not liable for a loss. *Brown v. Litton*, 1 Peer. William, 141.

A bailee, who derives no advantages from his undertaking, is responsible only for gross neglect. Gross neglect is the want of that care, which every man how negligent soever, takes of his own affairs. *Jones on Bailment*, 118-119.

The guardian acted in this case with good faith, and with ordinary care, which is all that is required of him. He referred also to *Pimm v. Downing*, 11 Serg. & Rawle, 66. *Johnson's Appeal*, 12 Serg. & Rawle, 317. *Bonsal's Appeal*, 1 Rawle, 260.

Porter, for the appellee, contended, that there had been gross negligence on the part of the guardian, that although the bond was taken in 1816, and due in one year, he did not so much as observe the ordinary care of demanding, and obtaining the payment of the interest. The neglect of the obligor to discharge the interest, was enough to put him on his guard. He went into a commentary upon the evidence, and argued, that whatever might have been the apparent circumstances of *Weidman*, up to that time, that in the spring of 1819, they were suspicious, and the guardian, notwithstanding, took no step to secure his ward's money.

If it be made out to a reasonable probability, that his ward's money is lost by the negligence of the guardian, he is responsible. *Pimm v. Downing*, 11 Serg. & Rawle, 66.

In the case in *Rawle*, there was the exercise of an erroneous judgment, but without any negligence; and in *Peer. William*, the case is of a loss in consequence of the depreciation of the land upon which the debt was secured.

*Reply.* It is the harshest thing in the world to make a trustee responsible where he is in no default. *Jackson v. Jackson*, 12 Serg. & Rawle, 324. *Jackson v. Jackson*, 1 Atkins, 513. If a man is incapable or careless by habit, it is his misfortune, but if there be fault in such case, it is of those who appoint him. Here the money was out when the guardian was appointed, in the hands of one of the members of the family, in whom they confided. He went into a view of the facts to show, that the circumstances of the obligor were ostensibly good, until he sold his land in 1820, when

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his immense loss was revealed to him. This calamity had its origin in the depreciation of land, which no prudence could have foreseen nor vigilance guarded against. Up to this time he had the unreserved confidence of his neighbours, proved by the fact, that so many loaned him money without security. A prudent man would have pronounced the investment a good one, and the guardian would not, under the circumstances, have been justified in calling it in. In leaving it in his hands, the guardian did nothing more than other men did with their own money. Under these circumstances, to charge him with the loss, would produce that terror in guardians spoken of by Lord *Hardwicke*; and calculated to deter prudent men from assuming an office, which in itself is sufficiently onerous, and already undertaken with great reluctance. Nothing but supine negligence should make him liable. The case of *Pimm v. Downing*, where the guardian was exonerated, under circumstances against him much stronger than in our case, recognises the doctrine, that to charge a guardian there must be *lata culpa* or *mala fides*.

The opinion of the court was delivered by

HUSTON, J., (who stated the facts of the case.) It is a matter constantly occurring in every county, that executors or guardians are charged with losses, and to settle, if possible, some rule is desirable. Perhaps this case was so peculiar in some of the circumstances as to call for a decision, in part founded on those circumstances. The old cases at law as to the liability of executors, guardians, &c. are of such a nature as to excite astonishment. They would seem, by consent, to have been set up, like a cock at shrovetide, to be thrown at by all who delight in such sport. If an executor could not agree with a debtor of the estate, and to save expense, referred the dispute to arbitrators, who made a deduction from his demand, the executor was charged, and must make up this deduction out of his own pocket; and it did not avail him to prove that the deduction was properly made. This is cited as law by *Toller*, although it has not been the law for several centuries. It first changed to this, that a submission of a matter to arbitration, was an admission of assets; now that is not so; and it is at length considered, truly, as a mode of ascertaining matters on which the parties cannot agree. Courts of equity early interfered in the case of executors, &c. and as they were then obliged, in every case of a recovery on a bond, to interfere to save the defendant from paying the whole penalty, so they interfered to save executors and administrators, from paying what in justice and conscience they ought not to pay.

This case has been fully and ably argued, and this court is not unanimous. I proceed to state the ground on which the majority have come to a conclusion. I have said the old cases are unrea-



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sonable, and are not law now. There was a time when the affairs of executors were principally settled either in ecclesiastical courts, or in courts of law; but as the jurisdiction of chancery increased, it included, along with other trusts, the accounts, settlements and responsibilities of executors, administrators and guardians, which are now almost exclusively determined in that court. I shall not go into all the authorities, nor trace this jurisdiction from its origin, but content myself with a few cases. In 3 *Atkyns*, 480, *Knight v. Earl of Plymouth*, a receiver appointed in chancery for the rents of a minor, received seven hundred pounds, at Worcester. There being some expense and risk in remitting to London, in specie, he gave it to *Winsmore*, a trader in good credit, and took his bills on London. The bills were protested, and *Winsmore* became a bankrupt within a week: it was proved, however, that at the time the bills were taken, his credit was as good as any man's in Worcester. The receiver was not charged with the money, although it was urged, that not being a trustee appointed by the party, but by the law, he must answer with the utmost strictness; that he received compensation too for his services, and therefore was held to greater strictness. In 1 *Peer-William*, 141, where an executor, without being authorized by a decree, puts out money on real security, he is not liable though the money is lost, if given on security reputed good, and no fraud.

*Ambler*, 218. *ex parte Belshier*. The assignee of a bankrupt, who also receives a compensation, employed a broker to sell tobacco, who received the price, and about ten days after died insolvent. The commissioners of bankruptcy charged the assignee with the loss; but on application to chancery, the chancellor said, if the assignee was charged in this case, no sane man would ever become an assignee. He entered at large into the law, referred to several cases, and came to the conclusion, that it is not necessary, in every case, to take security; if the trustees act for the trust as prudent persons act for themselves, and in the usual way of business, they are not liable. In 2 *Vernon*, 240, *Jones and Lewis*, we find a still stronger case, and to the same effect—after decree to account and to pay over, an administratrix instead of going to the plaintiff and paying, left the money with her solicitor, to pay when called for; he was robbed, and she was excused. It is again put on the ground of her acting as prudent people act in their own cases; to keep the trust fund as they keep their own.

I could trace the same doctrine through every case from that time. In a neighbouring state, a chancellor of great eminence for learning, industry and ability, has fully adopted the same doctrine; and it is settled in New York, that executors, administrators or guardians, are not liable beyond what they *actually receive*; unless

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in case of gross negligence. Where they act as others do with their own goods, with good faith, and not gross negligence, they are not liable; indeed the first case is stronger than that. See 2 *Johnson's Ch. 27, et seq.* 4 *Johnson's Ch. 619.*

This subject has been considered in this court: I shall not review all the cases. In 11 *Serg. & Rawls*, 67. 6 *Pimm v. Downing and Stalker*, we have a case much stronger than this. The money was not forced from the administrators (the mother and uncle of the ward,) for three years, and was lost; for this the guardian was not held liable: part was in the hands of the joint guardian, and by *Stalker* given to his co-guardian, who was going into trade; for this he was held liable. The principle settled in that case, is, that for gross negligence, trustees are liable, and for their own acts in not carefully securing money, which was in their hands, and put out by them; but for not suing at once, a mother, who was an administratrix, and in good credit, or not suing her, when they first heard of her insolvency, if no probability of recovering at that time, they were not answerable.

In 12 *Serg. & Rawls*, 317 *Johns. Appeal*. The matter was again fully considered; in that case, the grounds for charging the guardian, were stronger than in this. In 1815, he settled with the executors, and for a balance to his ward, of one thousand six hundred and seventy-two dollars, he neither took, nor asked security, but interest was paid him. In 1819, the executor settled his account, and a balance of nine thousand dollars and upwards, was in his hands; the guardian took no step to recover his ward's share, for seven months. In 1820, he applied to the Orphans' Court, to have security or that the executor should be dismissed, and he was dismissed. It is true that the money was not payable to the ward until she was twenty-one, but the executor was not cited to give security, until he was totally insolvent; yet there was no suit nor judgment against him, until after he was dismissed by the Orphans' Court, nor no evidence that he was of doubtful credit; nor of any notice to guardian, except by deposition of the widow, who had trusted him, and who, herself had no security.

It is there said, to be the harshest demand that can be made in equity, to make a trustee answerable for what never was in his hands, or to make up a deficiency not owing to his wilful default. More ought not to be expected from guardians, than common prudence; they should not be made liable, unless under unfavorable circumstances; their acts expose them to the animadversion of the law, for supine negligence, shewing carelessness of duty and of the ward's interest, or when the loss is occasioned by their own act, in giving credit without taking security, when they sell goods or put out money in their own hands.

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Where executors or administrators, take possession of the goods of the deceased, and sell them, (usually in this country at auction,) it is usual to require from the purchaser, of such as are sold on credit, surety in the note; if this is not taken, the executor is generally charged with the amount, for he had the goods in his own possession: but he is not obliged to take a freeholder for bail. If the bail is a man generally reputed good for so much, it is sufficient. So if a guardian has on hand money of his ward, and puts it out, he will generally be liable, unless he take a surety in the note. I do not say, he would in all cases: *ex gratia*, if he took a mortgage on land, and an old title, unknown at the time, should sweep away the property. In short, whenever the executor or guardian, actually has the fund, and disposes of it to another, he must do it with proper and strict caution, as a prudent man would, and is seldom safe unless he does take security. But where the fund never actually comes into the hands of a guardian, all the cases make a difference; he is not bound instantly to sue in all directions: the mother, brothers, or brothers-in-law of the ward, are not to be harassed to extremity, if to all appearance, and in the general opinion, the money is safe in their hands. If adults of the family have funds in the same situation, or if other prudent men have, and consider all safe, the law does not require every possible precaution and exertion from a guardian.

An unusual rise and depression of property, occurred over most parts of this State, from 1814 to 1820, many of those who were considered, and who were of eminent skill in business, of great industry, and as honest as any of their neighbours, were ruined. It was a time in which ruin overwhelmed many of all classes, and accident had more to do in the eventual wealth or poverty of every man, than knowledge or exertion. The infatuation, as it is now called, pervaded all ranks. A few from extreme caution, a few from extreme indolence, and perhaps some few from a great superiority of mind, or experience, kept aloof. It is not right, however, to make them a standard, by which trustees, are to be held liable or not; pre-eminent knowledge or uncommon foresight, are not required. Ordinary men are to be compared with, and judged by the standard of ordinary men. Common skill, common prudence, and common caution, are all that courts have required or ought to require.

There is no proof that *Weidman*, was a general speculator; he bought a place called the Dry Tavern: no one has said he bought too high or lost by it. If he had become extravagant or intemperate, or lost his character for honesty, or if an opinion that he was failing had generally existed, the guardian ought to have sued or got security. The proof fairly viewed is, that until the sale of his

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Garber place, had shown a loss of above twelve thousand dollars, he was considered safe; and even then the widow did not sue, nor ask security, nor did any but two out of about twenty creditors, all of whom, we must take to be careful, prudent men. Your money lenders, are not dull sighted, nor negligent of their interest; and no court, I think, has said that a guardian is liable unless he have more caution, more knowledge, or more foresight, than his neighbours.

No two cases of this kind can be exactly alike in all their circumstances, and therefore, courts can only give general rules. Whether a case comes within a general rule, is a matter about which judges have differed, and will differ. In this case, a majority of the court are of opinion, that, as he never had possession of the money, and found it in hands which the family and neighbours thought safe, it was not gross or culpable negligence, to leave it there. As to not getting the interest, it was probably, perhaps certainly, because the ward did not need it. The fact, that *Weidman*, was deeply indebted, though believed solvent, is answered by the case from *Atkins*, in which he whose drafts the receiver took, was believed good, though he became bankrupt in a week.

As to not suing after sale of the land, it is answered by *Pimm v. Downing*, where the guardian was excused for not suing the administrators as soon as he heard they were indebted, because there was no evidence, he would then have got any thing. In this case, we see no evidence, that a suit would have obtained any more than is now got.

The decree of the Circuit Court, is reversed as to all which respects the amount lost by the insolvency of *Weidman*. The rest of the decree is affirmed.

Top, J., dissented.

Decree reversed.

Pen. & W.  
lpw 216  
153 533

Pearse  
& Watts  
lpw 216  
413C 183

**AMOS SLAYMAKER, administrator of JOHN BOYD, deceased,  
against JOHN WILSON.**

**IN ERROR.**

A witness is incompetent to prove a signature, without proof of having seen the person write, or of other circumstances to show knowledge of the hand-writing which he is called to prove.

It is not enough, without such preliminary proof, that the witness swears that the signature offered, is the signature of the person whose it purports to be.

The redemption of a pawn is not affected by the statute of limitations, which runs only from the conversion of the thing pawned. But a simple contract debt is not protected from the statute, because accompanied with a pledge as a collateral security.

**WRIT** of error to the District Court for the city and county of Lancaster.

In that court it was an action of debt brought on the 22d day of January, 1821, by the defendant in error who was plaintiff below, against the plaintiff in error who was defendant below, upon the following paper:

"Friend *John Wilson*, I was at your house this-day to see if you could let me have one hundred and fifty-four dollars, I owe it to *Thomas Coates*, he will call to-morrow. I have left the deed, and if you pay him the money, get him to sign the receipt in the deed, this from yours,

"May 3d. 1798."

"*John Boyd*."

The defendant pleaded *nil debit, non assumpsit*, payment with leave, &c. and the statute of limitations; upon which the plaintiff took issue.

Upon the trial of the cause, the plaintiff gave in evidence the order of the 3d of May, 1798, on which he founded his suit, and offered a deed, dated the 29th day of April, 1794, acknowledged on the 31st July, 1797, from *Thomas Coates* to *John Boyd*, for a moiety of a tract of land in Leacock township, Lancaster county, together with the receipt for the purchase money on the deed, with proof that the subscribing witness to the receipt, *William Jones*, was dead, and the deposition of his daughter, *Elizabeth M Graw*, in which she deposed, "that the signature of *William Jones*, signed, as a witness, to the receipt for the money, on a deed from *Thomas Coates*, to *John Boyd*, is the hand-writing of *William Jones*, the father of this deponent."

To this testimony so offered, the defendant objected, but the court overruled the objection, admitted the evidence, and sealed a bill of exception.

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By the evidence, it appeared that the parties lived no great distance from each other, in the county of Lancaster; that the plaintiff brought three suits against the defendant's intestate, *John Boyd*, to August term, 1810. Two on bonds, each for the payment of five hundred dollars; another on a single bill, for the payment of one hundred pounds; and another on a book account for money lent, amounting to two hundred and two dollars, all dated after 1800. On the two first of these cases, no judgment was obtained, but the money had been paid, and on the last, judgment was had for four hundred and twenty-four dollars and sixty cents, which had since been paid.

The court below, in answer to points put, charged the jury that —“the order in this case contains a request that *Wilson*, if he lent the money, should procure the signature of *Coates*, to the receipt on the deed. It appears by the paper that the deed was left for that purpose. If there was no fact in the case on this subject, out of this paper, it would be the duty of the court to give it in charge to you, what the legal construction of the paper is. But this deed, from *Coates* to *Boyd*, is produced on the trial of the cause by the plaintiff. If the jury should be of opinion, that the deed is the one spoken of in the order, and that from the terms of the order and the fact, if they believe it to be so, that the deed has ever since been in the possession of the plaintiff, and the deed was left as a pledge to secure the payment of the money, the act of limitations does not apply to this case; but if the jury should be of opinion that the deed in evidence is not the deed from *Coates*, mentioned in the order, or that it was not pledged as a security for the payment of the money, the act of limitations will bar the plaintiff, and he cannot recover.”

The court also charged the jury, that if the delay of the plaintiff, in bringing suit, had not been satisfactorily accounted for, it was the duty of the jury to infer from that, and other circumstances, in the case, the payment of the money claimed.

Error was here assigned in admitting the deposition of *Elizabeth McGraw*, and in the charge of the court.

*Evans*, for the plaintiff in error. Argued, that the deposition was improperly received. That no person is a competent witness to prove a signature, or hand-writing, but one who has seen the person write, whose hand he is called on to prove, and before such witness is permitted to give evidence, he must disclose, as a preliminary, his means of knowing the hand-writing. Here the witness was received to testify, that the signature was her father's, without any evidence that she had any knowledge of his hand-writing.

2. The statute of limitations is a bar. The attempt is to avoid the statute by the allegation that the money was loaned on a pawn or pledge. The order contains no evidence that the deed was pawned, it is a simple request to loan money; and the possession of

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the deed does not of itself prove a pawn. But if the plaintiff allege a pawn, he could not recover, for he must return, or offer to return a pawn, before he can bring suit to recover money, for which it is pledged. 1 *Bacon Ab.* 370. *Garlick v. James*, 12 *John. Rep.* 146.

But the issue was joined, as to the statute of limitations, on the replication that the defendant did assume within six years. There was no proof of such assumption, and it is not competent, under this issue, to rely on the alleged pawn to avoid the statute. To give that effect, if entitled to any, it should have been specially pleaded. *Wherup v. Hill*, 9 *Serg. & Rawle*, 11. *Wister v. Gray*, 5 *Bin.* 573. *Eckert v. Wilson*, 12 *Serg. & Rawle*, 393. *Bailey v. Bailey*, 14 *Serg. & Rawle*, 195.

*Hopkins*, for defendant in error, as to the bill of exception, argued, that where a witness called to prove hand-writing, swears to belief, he must state his grounds of belief, and knowledge: but where the witness, as here, swears to the actual fact, that the hand-writing is the writing of an individual, it is better evidence, than evidence of belief, founded on antecedent means of knowledge of hand-writing.

2. The question of pawn, being one of fact, was properly left to the jury.

The statute of limitations is inapplicable to the case of a pawn. The deed could not have been recovered without payment of the money for which it was pledged. And as the deed could not be recovered without payment of the money, so as long as the deed is retained, the money can be recovered: and no period will destroy this mutual obligation in the case of a pawn.

The pawnor has his life-time to redeem, and if not hastened by a request, his executor or administrator may redeem. *Cortelyou v. Antill*, 2 *Caines C. in Error*, 199. In reason, the rule should be reciprocal, the pawnor having his life-time to redeem, the pawnee should not be barred by the statute for the money advanced on the pawn. No power short of redemption, or a tender, can bring time to operate. *Kemp v. Westbrook*, 1 *Vesey*, 278. 1 *Bacon Ab.* 372 a.

Trover for the pawn will not lie without payment, or tender. No precise words are necessary to create a pawn. 1 *Bacon Ab.* 370.

The replication to the plea of the statute is not before the court. The court below did not refer to the pleadings. But on this replication it is full evidence to prove, that the defendant assented to the continuance of the pawn in the possession of the pawnee.

Besides, the plea of the statute was a nugatory plea. The plaintiff must show a right to recover, independent of the statute, and the issue upon it cannot divert the investigation from the merits. The objection now urged, is to the pleadings, and should have been made on the trial. *Thompson v. Cross*, 16 *Serg. & Rawle*, 350.

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*Norris*, for the plaintiff in error, in reply. The suit is for money loaned, simply, that is the cause of action to which the plaintiff is confined. Yet notwithstanding he seeks to recover a debt upon a pawn. He must be confined to the issue on the statute of limitations, and cannot travel out of it. If he relied on special matter in avoidance of the statute, he must set it out in his replication. *Whereup v. Hill*, 9 *Serg. & Rawle*, 11. There is no evidence of a pawn, nor is it like an indefinite deposit. The order itself shows it was left to get the signature of Mr. *Coates* to the receipt. Independent of the statute, the lapse of more than twenty years, created an insuperable presumption of payment.

The opinion of the court was delivered by

GIBSON, C. J.—Without proof of having seen her father write, or other circumstances to shew her knowledge, Mrs. *M. Graw* was incompetent to prove his signature; and her deposition ought to have been rejected.

The redemption of a pawn is not affected by the statute of limitations, which runs only from the conversion of the thing pawned; and trover may, consequently, be brought within six years from that time. The present, however, is not an action by the owner in affirmance of the contract of bailment, but by the pawnee to recover a simple contract debt, which is certainly not the more protected from the statute because accompanied with a pledge, as a collateral security; nor is it, on that account, the less subject to the mischief against which the statute was intended to guard. Had the matter been stirred before those who knew the circumstances had passed away, it is highly probable, that the transaction would have been explained so as to shew that nothing is due. Certainly the delay of twenty-three years, unaccounted for, raises an omnipotent presumption. But was the deed deposited, in fact, as a security? Nothing in the order on which the money was paid, indicates such a conclusion; and it seems to me the court ought so to have instructed the jury. But it is said that the construction being affected by a circumstance *dehors* the order; the production of the deed was for the jury. I am at a loss to see what operation that could have. The deed was in the plaintiff's possession for some purpose; but whether as a pledge, or for the purpose indicated in the order, could not appear by the naked production of it. I presume the argument is, that the owner would have demanded it in a convenient time, had he not been conscious that it was held as a security. This is the first instance in which delay has been set up to strengthen a plaintiff's case. On the other hand, there is an infinitely stronger presumption that the plaintiff would have exacted the interest, if not the principal, if any thing were due. But in any event, the statute of limitations furnishes a bar to the action.

Judgment reversed.



**JOHN KELLER**, assignee of **JOHN GEST**, against **JACOB LEIB**, with notice to **CHRISTIAN STEHMAN, Jr.** terre-tenant.

IN ERROR.

Trustee for the payment of debts, paid a judgment against the debtor, and took an assignment in writing on the back of the bond on which it was entered, expressed to be for value received, held that it was competent to prove by parol, that the assignment had been made to enable the trustee to enter satisfaction on it, and not to preserve it as a subsisting debt.

If evidence must be immaterial when given, the court ought to reject it.

If a trustee pay a judgment against the debtor out of the trust fund, it is as much satisfied as if the debtor had paid it, and there is no legal or equitable reason for keeping it in force.

The trustee cannot, by taking an assignment of it, when it is paid, make it available against the lands of the debtor, conveyed after it was entered, either for a good or valuable consideration: nor can it be made to cover any other debt or demand.

*Query.*—Whether such trustee can proceed on a judgment against the debtor, (purchased with his own funds,) by execution.

In error to the District Court for the city and county of Lancaster.

This was a *scire facias post annum et diem*, brought by the plaintiff in error, who was also plaintiff below, to revive a judgment, which had been entered in the common pleas, at the suit of *John Gest, &c.* against *Jacob Leib*. The original judgment was entered on the 10th April, 1815, and the judgment which was sought to be revived by this *scire facias*, was entered to revive that judgment on the 22d November, 1819.

*Jacob Leib*, on the 2d May, 1818, conveyed by deed to *Christian Stehman*, the terre-tenant, and his son-in-law, one hundred and twenty-six acres of land, in consideration of twelve thousand and fourteen dollars, and natural love and affection; and on the 27th October, 1819, executed to *John Keller, John Leib* and *John Shober*, a deed of trust, for the use of his creditors, he being at that time largely indebted: but at the time of the deed to *Stehman*, the judgment in favour of *Gest*, and one other only existed against him. On the 2d of May, 1821, *John Keller*, one of the trustees, paid to *Gest*, the amount of this judgment out of the trust fund, and took an assignment of the bond, on which the original judgment was entered to himself; and it was expressed in the assignment to be for value received. On the 26th September, 1823, the trustees settled an account, in which they took credit for the amount of the debt, interest and costs, exceeding three thousand dollars, paid to *Gest*, on this judgment; stating however, on the face of the account, that the judgment was outstanding.

(John Keller, assignee of John Gest, v. Jacob Leib, with notice to Christian Stehman, Jr. terre-tenant.

The terre-tenant, who took defence, offered to prove by the deposition of *Gest*, that when the judgment was paid to him, *Keller* requested him to assign it to him, that he told *Keller* he had no objections, that he could enter satisfaction at Lancaster, as he was frequently there, and it was too far for the deponent to go for that purpose; that this would clear the estate, and the bond would be a voucher in his hands against the estate. That he made the assignment to *Keller* solely for the purpose, and the reasons stated. This evidence was objected to by the plaintiff, but received by the court, and constituted one of the bills of exception assigned for error here.

After this evidence, and proof of the payment of the judgment to *Gest*, the assignment to *Keller*, and the account of the trustees had been given, the plaintiff offered to prove, that at the time of the deed to *Stehman, Leib* was largely indebted; that fifty acres, part of the land conveyed, was conveyed in consideration of natural love and affection. This evidence was objected to by the defendant, and overruled by the court, and formed another bill of exception, assigned for error in this court.

The court charged the jury, that if they believed that the judgment was paid to *Gest*, out of the trust fund, in satisfaction of it, and that *Keller* took an assignment of it merely to enter satisfaction, the defendant was entitled to their verdict. This, and the answers of the court to the points put, which it is not necessary to state specifically, was also assigned for error.

*Jenkins* and *Hopkins*, for the plaintiff in error, argued that the testimony of *Gest* went to contradict and destroy the assignment on the bond, which was positive in its terms, and contained a stipulation, that the assignor should not be liable, and that no case had gone the length of admitting such evidence.

That the evidence as to the consideration of the land conveyed, connected with the indebtedness of the grantor, should have been received. It would have gone to avoid the deed, set up by the terre-tenant as a defence. *Hayden v. Mentzer*, 10 Serg. & Rawle, 329.

If the trustee paid the money, and took the assignment for a purpose beneficial to the trust, he had a right to do so. Here *Gest* had two funds, and the other creditors but one, and in equity, he would be constrained to seek satisfaction from that fund to which they could not resort. The assignment taken, and this *scire facias* would, if the plaintiff prevailed, accomplish this equitable application of the funds. *Dorr v. Shaw*, 4 Johns. Ch. R. 17.

The court declined hearing *Rogers, Norris* and *Frazier*, who were counsel for the defendant in error.

The opinion of the court was delivered by

HUSTON, J., (who recapitulated the facts of the case.)—As to the first bill we see no difficulty. In New York, where the courts of

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law are strict in rejecting parol evidence where there is written; yet there, evidence is constantly admitted to explain a receipt for money, and they have permitted a party to shew, that although a receipt was given in full for goods sold, yet in fact there was no money paid, but a note of a third person given, which was to be in full if paid. Our courts have done the same thing, *Leese v. James*, 10 Serg. & Rawle, 314. In cases of trust the courts will always permit the conduct of the trustee to be examined, and the real facts to be proved. The settlement by the three trustees, of whom Keller was one, showed a payment of this judgment by them all; the assignment appeared as if it had been by one. There are few cases in which the real state of the case cannot, by pleas or by proof, be brought before a court of law or equity; our courts exercise the powers of both.

As to the other exceptions—if evidence must be immaterial when given, the court ought to reject it. Now, if this judgment was satisfied, in fact and in law, the plaintiff, *J. Keller*, cannot recover any thing on it; if it is not satisfied, the lands of *Stehman* are bound by it, whether the conveyance to him by *Jacob Leib*, was fair or fraudulent; for a good and valuable consideration, or for no consideration. The counsel, aware of this, have discussed the matter on that point; and contended it, as if the assignment had been made to the three trustees, and the suit was for the use of creditors, and not of *Keller* alone. It is apparent, however, if this judgment is revived, so as to bind the land conveyed to *Stehman*, that they can and will sell not only the fifty acres said to be a gift, but the whole, for which he paid twelve thousand dollars cash; and the judgment would be conclusive against *Stehman*, as much for the one as for the other. There are creditors unpaid, and if there were any thing unfair as to them, in the conveyance by *Leib* to *Stehman*; if the fifty acres were a gift by a man deeply indebted, nay totally insolvent, it can be reached in another way.

But it is said, that where one creditor has two funds from which he can levy his debt, and another but one, chancery will compel the first to levy so as to leave property for the other. This is true sometimes: where the creditors and the debtor alone are interested, it is generally the case; but where another person is interested, and may be affected, it is not always true, and if that other person be an innocent purchaser for a valuable consideration, it will not be easy to find a case in which chancery has interfered to affect him. (See 1 *Johns Ch. Rep.* 226, and, I believe, every other book and case on the subject.) I have said if the conveyance complained of be fraudulent, it can be reached directly by those interested; and we are of opinion, that the attempt, in the present case, is not likely to eventuate in doing justice. If the judgment of *Gest* was paid off by the trustees, out of the trust fund, it is as much satisfied

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as if it had been paid off by *J. Leib*. They represent him, and can no more pay a judgment, and yet keep it in force than he could. If he had paid this judgment as surety, or if they had paid it for him, as surety or endorser, it might be used to reach the principal debtor: but when the real debtor pays a judgment against himself, or his trustees pay it with the trust fund, I can see no legal reason for keeping it in force, nor any equitable one.

It is, says chancellor *Kent*, in 4 *Johns. Ch. Rep.* 247, a sound and settled rule, that the penalty of a bond cannot be made to cover any other debt or demand, than that mentioned in the condition, (and he cites 2 *Caines Rep.* 286,) and proceeds, there could not be a more dangerous, and there certainly is not a more inadmissible pretension, than that the parties to a judgment may keep it on foot, after the original debt has been paid, to meet and cover new and distinct engagements between them. And he adds, that although in that case, the judgment had been revived, under the pretence that it was unsatisfied, at least, in part, and executions had issued on it, by the assignee, to recover the alleged balance, yet the assignee, if he took it, took it at his peril. And that whatever might be the case as to strangers who purchased property under it, yet the assignee of it purchases it at his peril, and he was decreed to be a trustee, and compelled to release. Another part of this case settles the question as to the admissibility of the evidence in the first bill.

A question almost the same as that before us, was decided by the Supreme Court of this State, and is reported in *Kuhn v. North*, 10 *Serg. & Rawle*, 399, in it, also, the question in the first bill seems to be settled. There, one of the assignees of an insolvent paid off a judgment, and charged the estate of the insolvent with the payment and the sheriff's officer endorsed satisfaction on the writ. On the next day, the assignee procured the judgment to be assigned to him; prevailed on the officer to erase the satisfaction endorsed on the writ, and gave it to another deputy of the sheriff to execute. The court decided, that an assignee who pays off a debt against the insolvent with his own money, may take an assignment of the judgment and proceed by execution; but if he pays off the debt with the trust funds, the judgment is satisfied, and the officer who executes process is a trespasser.

The point was not made, and therefore, I do not consider this as a deliberate opinion, whether such assignee can proceed on a judgment purchased with his own funds, by execution. I agree he may retain for his judgment in proportion with others, but I doubt whether he can proceed by execution, and sue and buy in, the trust property for himself—if so, a trustee by purchasing a judgment, may make strange work of it.

The District Court, then, were right in all the points, and the judgment is affirmed. Judgment affirmed.

FREDERICK DEMI, *against* CHRISTIAN BOSSLER.

## IN ERROR.

Where a lease is made for the term of a year, and the tenant sows the land with spring grain, before his term expires, he has no right to the crop of spring grain, cut after the term is out; and this whether the lease be for a money rent, or *on the shares*.

The custom in Pennsylvania, as to the way going crop, is confined to fall grain, sowed in the autumn, before the expiration of the lease, and cut in the summer after it determines.

IN error to the District Court for the city and county of Lancaster.

This was an action of trover and conversion, by which the plaintiff sought to obtain the value of oats, in the straw, which grew on twenty-four acres of land, alleged to be one thousand six hundred dozen of sheaves, of the value of three hundred dollars, and which came into the defendant's possession on the 15th of July, 1825.

On the 1st December, 1823, *Christian Bossler*, leased the land on which these oats grew to *Frederick Demi*, the plaintiff, for the term of one year, from the 1st day of April, 1824, to the 1st day of April, 1825. The lease contained a covenant that "*Demi*" should "cultivate; the said plantation by the shares" that each of the said parties "should have the one equal half part of all the wheat, rye, oats, indian corn, hay and pasture": the wheat, rye and oats, to be delivered in the bushel. The landlord, on the 28th December, 1824, served *Demi*, with notice to leave the premises, and by a proceeding under the landlord and tenant act, commencing on the 4th of April, 1825, compelled him to quit. The oats in question, were sown in the month of March before the expiration of the lease. The charge of the court, being with the defendant, a verdict was found for him: and the plaintiff brought this writ of error, and assigned for error, this opinion of the court.

*Porter*, for the plaintiff in error. The question is, whether a tenant who has put out a spring crop, in proper season, before the expiration of his lease, has a right to enter, after his term is ended, and cut that crop. By the terms of the lease, the tenant was to cultivate the land "by the shares," and divide the "oats," as well as other grain, in the bushel. The lease too, is without any restriction as to the mode of cultivation, and contains no covenant, that he should quit at the end of the term. The right claimed, is then consistent with the covenants in the lease, giving to the tenant a compensation for his labor, and the landlord the benefit of the covenant, to deliver the one half of the grain cut. The case of *Stultz v. Dickey*, 5 Bin. 285, establishing the right of the tenant to the way going crop, was a case in which fall grain was claimed;

(Frederick Demi v. Christian Bossalet.)

but the reasoning in that case is applicable to the present: that too, was the case of a money rent, this a rent by the shares. He referred also to *Carson v. Blazer*, 2 Bin. 475, 487. *Biggs v. Brown*, 2 Serg. & Rawle, 14.

*Henry*, contra. The tenant knew that his term was to expire on the 1st day of April, 1825, and had full notice to quit, before he sowed the grain in question, and he sowed it a few days before the end of his term.

This takes from his case all equity. The way going crop, the right to which exists in Pennsylvania, means the fall crop. This right, has its foundation in particular custom, and did not exist at common law. *Gordon v. Little*, 8 Serg. & Rawle, 533, 559. The particular custom is supposed to enter into the contract between the parties, and if the plaintiff wished to extend it to the spring crop, it was incumbent on him to prove a custom, to sustain him. A custom in derogation of the common law, must be construed strictly, and will not be extended without evidence. 1 *Blac. Com.* 78.

*Norris*, on the same side. Before the case of *Stultz v. Dickey*, 5 Bin. 285, decided at Lancaster; the custom, as to the way going crop, was not established in Pennsylvania, and is inconsistent with the language of the lease; which by its terms is to expire at the end of the year. But this custom, does not extend to give the tenant two spring crops, and one fall crop. The plaintiff was permitted to give evidence to establish such a custom, but in this he failed. Here the lease, by its terms, ends with the year, and cannot be carried beyond it, but by usage, and this is a matter *in pais*, and lies in proof. But the right contended for, is in the highest degree unreasonable; it would permit the tenant by sowing a spring crop, under a lease for one year, to occupy the premises rented for two years: and would be against the course of good husbandry, as it is in violation of the contract of the parties.

*Hopkins*, in reply. We do not rely on usage, we stand on our contract, and the law of the land. By the terms of the lease, the tenant had the exclusive right to the land for one year, with no other restriction, but that he should not under-let; he was to have the half of what was sown during the term, and the landlord the other half. There is no restriction in the lease as to the time he should sow. If to sow grain in the spring, as was done in this case, be contrary to good husbandry, the landlord should have guarded against it, by an appropriate covenant. As there is no such restriction, it is the defendant who must resort to the proof of usage, to effect a construction of the lease, which its language does not import, and that too, for the unjust purpose of depriving the tenant of a compensation for his labor.

The opinion of the court was delivered by

HUSTON, J. By the common law, a tenant after the expiration of

(Frederick Demi v. Christian Bossert.)

his lease, and removal from the tenement, had no right to return; and hence the crops growing and ungathered, were lost to him. The law in this State has varied from that, as to what has been called the way going crop, which, heretofore, has been confined to grain sown in the autumn, to be reaped the next harvest: and no difference has yet been established between a tenant, who pays a rent in money, and one who gives, as rent to his landlord, a share of the produce of the farm. The usage and general understanding of the country form a part of general agreements, unless otherwise specified. 5 Bin. 285, *Stultz v. Dickey*. If a tenant rents a farm for one year, it is understood, he is to take one crop of each kind of grain cultivated, and that he is to mow as many crops of grass as the meadows will produce. If a tenant on a moneyed rent, can sow with oats, flax or other grain in March, before his lease expires, which is always about the first of April; he in fact gets the benefit of the farm for two years, although he pays the rent of but one. So, if he takes the farm on the shares, and after raising the summer crop one year, sows in March all the grounds with oats, no tenant can go on it the next year, or he will have no land to cultivate for spring crops, and can put in fall crops, but on oats stubble, which yields badly. The law has been well and justly settled, and favorably to tenants. The present attempt is unreasonable, and pregnant with injustice to one party, and would eventuate in injury to tenants as a class; for the tenant who rents a farm for the ensuing year, will not know, whether he can put in a spring crop until he knows whether the month of March will be clement or inclement, or whether the previous tenant was regardful of the rights and interests of others, and the general laws and usages of the country. The conduct of *Demi*, in this particular case, was unreasonable and unjust, and to sanction it would only introduce a new clause into leases. It is contrary to the common law, to the law as settled in this State, and is not pretended to be sanctioned by any usage.

Judgment affirmed.

**ROYER, STULTZFUS and ECKERT, appellants, against  
TATE and others, appellees.**

A decree which does not dispose of the whole fund for distribution, under the act of assembly "relative to the distribution of money arising from sheriff's and coroner's sales," is not a *final* decree, and an appeal taken from such decree will be quashed.

This was an appeal taken by *Abraham Royer, John Stultzfus* and *Peter Eckert*, from the decree of the Court of Common Pleas of Lancaster county, in the matter of the distribution of the money raised by the sale of the real estate of *James Hamilton*, deceased, by the sheriff.

On the 2d of September, 1825, the sheriff was ruled to pay the money into court, and notice to *J. Hopkins, Esq.*, at bar, was noted on the record. On the 9th September, 1825, he paid seven thousand seven hundred and thirty-five dollars and twenty-five cents, the nett proceeds, into court. On the 30th September, 1825, a rule was taken to show cause why the judgment of *Susannah Ellmaker*, should not be paid out of these proceeds, and on the 29th December, 1825, a similar rule was taken in behalf of *Hamilton, Potter, Ramsey* and *Clark*, other judgment creditors of *J. Hamilton*, deceased. On the 13th of March, 1827, these rules were argued; and on the 1st May, 1827, the court decreed, that "the judgments obtained by *Tate* and wife, No. 7, to April term, 1817; *Joshua Potter*, to April term, 1821; *William Ramsey*, to the same term; *Grayson*, assignee, &c. to January term, 1818, and *Susannah Ellmaker*, to August term, 1824," are entitled to be paid as judgments on specialties out of the proceeds of the sale of the real estate of *James Hamilton*. Those obtained by *Tate* and wife, No. 8, April term, 1817; *Jane M. Tate*, to August term, 1824; by *Clark* and wife, to April term, 1823, "are entitled to be paid as judgments on simple contract debts only." The court added. "We cannot recognize *John Stultzfus, Peter Eckert* and *Abraham Royer*, as specialty creditors. There was no debt due to them at the time of *J. Hamilton's* death. Their remedy is confined to the covenant of warrantee in the deed, and the claim must be made out judicially before it can be enforced."

From this decree an appeal to the Supreme Court, was taken by the present appellants, and on the 6th of June, 1827, this appeal was dismissed. On the 26th June, 1827, *Hopkins*, moved the Court of Common Pleas, on the petition of the appellants, "That the court proceed to make a final distribution of the proceeds of the real estate of the said *James Hamilton*, agreeably to the 14th section of the act of the 19th April, 1794, and that if it should appear, that any incertitude, as to the question of any other claims exists, that the court direct issues to ascertain them." On the 30th June, 1827, that court made the following decree:

"The court having decided on the 1st May, 1827, that the judgments obtained by *Tate* and wife, to April term, 1817, No. 7; of



(Royer, Stultzfus and Eckert, appellants, v. Tate, and others, appellees.) *Joshua Potter*, to April term, 1821, No. 440; of *William Ramsey*, to April term, 1821, No. 441; of *Grayson*, assignee of *John Whitacre*, executor of *Stephen Wray*, to January term, 1818, No. 52; *Susannah Ellmaker*, to August term, 1824, No. 28, are entitled to be paid as judgments on specialties out of the proceeds of sale of the real estate of *James Humilton*; and that *John Stultzfus*, *Peter Eckert* and *Abraham Royer*, could not be recognized as specialty creditors; no questions on those points are now open for discussion. Under that decision, the prothonotary should pay the amounts due on those judgments, and if not paid after this declaration of the court, payment will be enforced by attachment. The court will proceed on a proper application, by those who claim any part of the balance to make a final distribution of it agreeably to law, and, when such claims are made; if any facts connected with such distribution, should be disputed, the court will direct an issue, if the party asking it, be legally entitled thereto."

Same day (30th June,) appeal was taken by *James Hopkins*, attorney of *Abraham Royer*, and others, and this affidavit made, viz: "*James Hopkins, being duly affirmed according to law, saith, that this appeal is not taken for the purpose of delay, and further saith not.*" On the 23d of July, 1827, bail on the appeal was entered.

*Champneys*, *Porter* and *Ellmaker*, for the appellees, now moved the court to dismiss the appeal.

1. Because the affidavit made to obtain the appeal, is not that required by law, and the security required by the act of assembly, was not entered.

2. No decision was made after the 1st day of May, 1827, from which an appeal could be taken.

They referred to *Pamphlet laws 471, act of the 16th of April, 1827. Purd. dig. 613, act of 27th March, 1813.*

*Hopkins*, contra, contended that the first decree of the 1st May, 1827, from which the appeal was taken, which was dismissed by the Supreme Court, was but interlocutory; and that the decree made on the 30th June, 1827, from which this appeal was taken, was the final decree. A decree is only final when the court dispose of the whole subject matter in dispute. Under the act of assembly authorising this proceeding, no bail is required to obtain an appeal. The appeal is effectual without bail, although without it, there is no *supersedeas*. *Magil v. Cauffman*, 4 *Serg. & Rawle*, 318. The affidavit is stronger than that required by the act, and is well taken by the attorney of the appellants.

PER CURIAM.—This appeal must be quashed. There is yet no final decree. The Court of Common Pleas must have all the parties before them, and dispose of the whole fund. This must be done to make a final decree.

Appeal quashed.

NOTE.—ROGERS, J., was sitting at *Nisi Prius* in Philadelphia, during this adjourned court, and took no part in the judgments given at it.

# CASES

IN

# THE SUPREME COURT

OF

## PENNSYLVANIA.

LANCASTER—MAY TERM, 1830.

**NEIL CROSBY and PATRICK CROSBY, against LYDIA MASSEY and others.**

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When a judgment is irregularly entered against a defendant, by default of appearance, who being informed of it, neglects or refuses for two terms, and until after a writ of enquiry of damages is executed, to make an application to have the judgment set aside, it will not be reversed on a writ of error.

The time and manner of filing *narr*, of appearing, pleading and signing judgment, for want of plea, &c. are matters of practice regulated by rules of court: and any one complaining of irregularity therein, must apply for redress as soon as he knows of the injury.

**ERROR to the Common Pleas of Schuylkill county.**

This action was instituted by the entry of the following agreement between the parties.

<i>Lydia Massey</i> and others.	}	Amicable action in trespass on
v.		the case.
<i>Neil Crosby</i> and <i>Patrick Crosby</i> .	}	

We, the defendants above named, hereby authorize and require the prothonotary of the court of Common Pleas of Schuylkill county, to enter up the above stated amicable action of trespass on the case to July term, 1827, and we agree that the same proceedings be had thereon, as though we had been regularly summoned.

In witness whereof, we have hereunto set our hands, the fourteenth day of June, 1827.

*Neil Crosby,*  
*Patrick Crosby,*

I agree to the entering up of the above amicable action on the terms above mentioned.

*Jno. Bannan,*  
Att'y for Plaintiffs.

(Neil Crosby and Patrick Crosby, v. Lydia Massey and others.)

This agreement being entered on the record to July term, 1827, a declaration for use and occupation of a saw-mill, was filed on the 28th, September, 1827, and, on the same day, a judgment by default of appearance, was signed by the plaintiff. On the 26th February, 1828, a writ of inquiry of damages was issued, by which the damages were assessed at three hundred and twenty-five dollars. On the 31st March, 1828, Mr. *Loeser* appeared for the defendants, and obtained a rule to shew cause why the judgment and inquisition should not be set aside. In October, 1828, upon hearing the testimony, the court discharged the rule, and entered judgment on the inquisition.

The substance of the testimony was, that the next day after the judgment was entered, Mr. *Bannan*, the plaintiff's attorney, gave notice to the defendants that judgment had been entered, at which they expressed their surprise, and said that Mr. *Loeser* had been employed by them to make defence: The next day Mr. *Loeser* called on Mr. *Bannan*, and requested him to open the judgment, which he refused to do, but told Mr. *Loeser* he might ask the court to set it aside. At the next court after this conversation, Mr. *Loeser* said to Mr. *Bannan*, that he was prepared to make a motion to have the judgment opened, but he had concluded that he would not, as his clients would derive an advantage from the judgment, in another action which was pending, in which his clients were interested.

Errors assigned. 1. The court erred in rendering judgment against the defendants by default, after they had both appeared in their proper persons.

2. The court erred in refusing to set aside the judgment and inquisition.

3. The court erred in rendering final judgment on the inquisition.

4. The interlocutory judgment entered on the 28th September, 1827, is uncertain and void, and is no foundation for a writ of inquiry of damages.

*Loeser*, for plaintiff in error. This is a judgment by default of appearance, entered in vacation on the same day the declaration was filed, when there was, in fact, an appearance by the defendants. The agreement by which the action was instituted was an appearance, and the defendants were entitled to notice of any further proceeding.

*Bannan* for defendant in error. The agreement amounts to nothing more than a waiver of the writ of summons, whereby that expense might be saved, the words are "and we agree that the same proceedings be had thereon, as though we had been regularly summoned."

The judgment was not void, and if it is irregular, the party must take the earliest opportunity to have the error corrected.

(Neil Crosby and Patrick Crosby, v. Lydia Massey and others.)

Here the defendants knew of the judgment the next day after it was entered; at the next term their attorney refused to make the application to have the judgment opened, and did not make it until after two terms had elapsed, and the plaintiffs had been put to the expense of executing a writ of inquiry of damages. This is an acquiescence which concludes the defendants. 1 *Penn. Prac.* 92. *Morrison v. Wetherill*, 8 *Serg. & Rawle*, 502. *Tidd's Prac.* 434, 507. 2 *Arch. Prac.* 201. *Cochran v. Parker*, 6 *Serg. & Rawle*, 549.

*Buchanan*, in reply. The judgment being erroneous, the attorney of the party had no power to release the errors: and much less should his loose declarations be so construed as to conclude the defendants. By a rule of the court of Schuylkill county, "no parol agreement between attorneys is binding."

The judgment by default was interlocutory, upon which no writ of error would lie, until the writ of inquiry was executed; the defendants, therefore, have taken the earliest opportunity, and the mode pointed out by law to correct an erroneous judgment: they have not acquiesced. In the case of *Ranck v. Becker*, 12 *Serg. & Rawle*, 412, this court reversed the judgment entered upon an award of arbitrators, although the party had entered bail for the stay of execution.

The opinion of the court was delivered by

HUSTON, J., (who stated the facts of the case.)—It has been contended here, that the judgment was irregularly signed, was erroneous, that defendants had a right to wait till final judgment on the inquisition, and if the inquest awarded a small sum, acquiesce; if a large one, take a writ of error and reverse it.

Perhaps there was a time when such was the law, but much of what was once the subject of a writ of error in England, or of *audita querela* is now relieved from on motion, and I doubt whether any counsel, would venture to argue a writ of error in England, in such a case as the present. The time and manner of filing a *narr*, of appearing and pleading by defendant, and of signing judgment for want of a plea, &c. are matters of practice regulated by rules of court, and the practice of the court, and irregularities in any of these respects are universally remedied by applications to the court, whose rules or practice is supposed to have been violated. *Tidd's Prac.* 434, 8 *Serg. & Rawle*, 502. One universal rule is, that the person complaining of any irregularity, must apply for redress as soon as he knows of the injury. In no court is he allowed to lie by, conceal his complaint, subject the other party to delay, expense, and perhaps total loss, and after all this, to obtain redress for a mistake, of which he had full knowledge as soon as it was committed.

The complaint here is, that the entry of the amicable suit, was in effect, an appearance by the defendants and they were entitled

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to a rule to plead. The plaintiffs contend, it in fact only amounted to an acknowledgment of service of writ, but not to an appearance.

I think, the plaintiff was wrong, that the judgment was irregular and would have been, or ought to have been set aside, if the application had been made at the next term. The plaintiff's attorney seems to have thought so. It was not made at the next nor even the second term. If we reverse here, we take from the Common Pleas all power of regulating their own practice, all controul over counsel, and causes in their court; we assume the controul and supervision of every rule in every cause in the State; and all this, not to effect justice, but to restore an obsolete practice of disregarding right and justice, and deciding every cause according to the strict accuracy and accumen of the pleader.

I repeat, what has been often said, that the several Courts of Common Pleas, have a right to make their own rules, and regulate their own practice. It is possible, a rule of court may be contrary to an act of assembly, and illegal. I don't say, we will not in any case reverse for a practice under such a rule. The rules and practice followed in this case, are salutary and wise, and the decision of the court on these rules, right. I am not sure, that such a decision as that complained of in this case, depending on several rules of court, and the practice under them, and where the facts were brought before the court on affidavit, is the subject of a writ of error. I do not say, however, that we will not in any case reconsider a case so brought before us. In the present case, the judgment of the court below is affirmed.

Judgment affirmed.

MARTIN WENGERT and ABRAHAM WENGERT, executors of LUDWIG ZEARING, deceased, against DAVID BEASHORE.

An action for maliciously suing out a *captias ad respondendum*, and holding the defendant to bail, is not to be favoured; and clear proof of want of probable cause is necessary to support it.

As a general rule, it may be laid down, that such an action cannot be supported, when in the original action, the defendant was obliged to set up some collateral matter by way of defence, which did not appear on the declaration or the face of the instrument declared on.

Where such original action was brought by executors, maliciously and without probable cause; in an action therefor against them, they must be sued in their individual capacity; a writ and declaration calling them executors, is not mere description or surplusage, but is error.

ERROR to Lebanon county.

This was an action on the case brought by David Beashore, against Martin Wengert and Abraham Wengert, executors of Ludwig

(Martin Wengert and Abraham Wengert, executors of Ludwig Zearing, deceased, v. David Beashore.

*Zearing*, deceased, for maliciously suing out a *capias ad respondendum* against him, and requiring bail without probable cause of action.

The facts of the case were these: *Ludwig Zearing*, in his lifetime, to wit, in 1817 held *David Beashore's* bond for three hundred and ninety-six dollars, and upon his death, it came into the hands of the defendants *Martin Wengert* and *Abraham Wengert*, his executors, who to April term, 1824, brought suit upon the said bond by issuing a *capias ad respondendum*, and required bail in five hundred dollars; the same day it issued, the defendant *Beashore*, was taken by the sheriff, and not being able to get bail, he was imprisoned. A rule of reference was entered by the defendant, and arbitrators were chosen, who met on the 12th April, 1824, the defendant then proved the consideration of the bond, and that it had failed; the arbitrators reported no cause of action. Upon the report being filed, the plaintiffs *Martin* and *Abraham Wengert*, by advice of their counsel, refused to discharge the defendant *Beashore*, from custody. No appeal was entered by the plaintiffs, and after the twenty days had elapsed, the defendant was discharged on *habeas corpus*, and brought the present suit to recover damages.

The following points were put to the court by the defendants, upon which they requested them to charge the jury:

1. That this action cannot be supported by the plaintiff, in its present form.

2. That no action for a malicious prosecution can be maintained against executors.

3. That the plaintiff has misconceived his remedy; that if any injury has been sustained by him, he ought to have sought redress, by an action for false imprisonment against the defendants in their individual capacity, and that no action can be maintained by the plaintiff against the defendants in their representative capacity, as the executors of the said *Ludwig Zearing*, deceased, for the supposed injury set forth in the declaration.

4. That the plaintiff, before he can recover in this action, must prove malice in the defendants, and want of probable cause at the time suit was brought.

5. That when a plaintiff sues out a writ, such as in the present case, founded on the bond or writing obligatory of the defendants, no action for a malicious prosecution can be supported; for the want of probable cause, does not, nor cannot exist.

6. That defendants having called upon counsel, and issued the writ in pursuance of his directions, and acting as executors of *Ludwig Zearing*, excludes in law, every presumption of malice in the defendants.

7. The want of probable cause alone, and the defendants having failed to recover in the suit which they brought against *David Beashore*, are not circumstances sufficient in themselves to warrant

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the jury in finding a verdict in favour of the plaintiffs; unless the defendants knew the want of probable cause at the time they brought their suit. That the jury cannot infer malice in the defendants from the circumstance of their failing to recover in their suit on the bond against *David Beashore*.

To which the court answered:

1. This action can be supported and maintained by the plaintiff in its present form, the styling of the defendants executors is merely a personal description.

2. It cannot be maintained against them as executors.

3. This suit is not against them as executors, in their representative character; and they are answerable in this suit, in their individual capacity, notwithstanding they are styled executors, and the plaintiff has not misconceived his remedy.

4. The jury must be satisfied, from all the circumstances given in evidence, that the suit against the present plaintiff was brought maliciously, and without probable cause; malice and want of probable cause both are necessary, and must be shown, in order to maintain an action for a malicious prosecution, either of a civil proceeding or criminal prosecution. Express malice is not required to be proved; malice may be implied. For if the plaintiffs case proves that the proceedings against him were groundless, and that the defendants knew it; then malice will be implied. Holding to bail where the plaintiff has no cause of action, and knows that he has no cause of action, if done for the purpose of vexation, entitles the party aggrieved to an action for a malicious prosecution.

5. Want of probable cause may exist where a suit is brought on a bond. The circumstance of a suit being founded on a bond or writing obligatory, is no bar to an action for a malicious prosecution.

6. If upon a fair representation of facts to the counsel, by the defendants, he advised the bringing of a suit upon the bond, and guided by that advice, they brought suit on that bond, the law will not impute malice to the defendants; for the clients ought not to suffer by the honest mistake of their counsel, if they innocently acted by his advice. But if they did not make a fair representation of facts to their counsel, and knew the proceedings on the bond were groundless, the law will impute malice to the defendants. Whether the suit was brought maliciously and for the purpose of oppressing the defendant, is a conclusion of fact to be drawn by the jury from all the circumstances of the case. It does not follow from the plaintiff's failure to recover in the action on the bond, that the suit was brought with a view to vex, and improperly injure the defendant in the case.

7. The want of probable cause alone, and the defendants having failed to recover in the suit which they brought against *David*

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*Beashore*, are not circumstances in themselves sufficient to warrant the jury in finding a verdict in favour of the plaintiff, unless the defendants knew the want of probable cause at the time when they brought their suit. The jury cannot infer malice in the defendants, from the circumstance of their failing to recover in their suit on the bond.

The charge of the court was assigned as error.

*Kline and Weidman*, for plaintiff in error.

*J. A. Fisher*, for defendant in error.

The opinion of the court was delivered by

Ross, J.—The action for malicious prosecution, is very different from that of maliciously and vexatiously arresting and holding defendant to bail. Many reasons might be assigned why the one should be sustained, which would not apply to the other. In the former, the defendant, even if acquitted, recovers no costs; in the latter, a verdict in favour of defendant entitles him to costs. In the former, the defendant has no other redress for any injury he may have received; in the latter, he may cite the plaintiff before a judge to shew his cause of action, and if no sufficient cause be shown, he will be discharged on common bail. In the former, if felony, punishable with death, he may not be allowed to give bail; in the latter, the defendant is always allowed to give bail. In the former, he can only be exonerated by a trial and acquittal; in the latter, the defendant may have any oppressive, vexatious or illegal process set aside, on motion to the court. In the former, the defendant cannot demand a writ of error as a matter of right; in the latter, he is entitled to it. In the former, the defendant's life may be put in jeopardy; in the latter it never can: no punishment can be inflicted on him. In the former, the prosecutor gives no bail; in the latter the plaintiff, until of late, must have given real pledges, who on failure of plaintiff to prosecute his suit, &c. were liable to be amerced, and the plaintiff himself was amerceable *pro falso clamore*, liable to costs. See 1 *Sed. Prac. Introd.* 49, 50, 59. *Bul. N.P.* 11. The action for malicious prosecution, properly so called, has often been brought in this State, and sustained by the courts; the action for maliciously and vexatiously arresting and holding defendant to bail, it is believed, has seldom been brought in this State, and has never received a judicial recognition. Yet it must be understood that no doubt is intended to be intimated of its lying in proper cases, and under proper restrictions; but it is not to be favoured. Enough has been said to show, there is a substantial difference between the two descriptions of action. Yet from not attending to the want of similarity between them, they have been, in modern times, considered as analogous. The same decisions and principles of law have been applied to both.



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The practice of the courts in England, as well as the law as to arrests, and holding to bail, is very dissimilar from the practice in this State. In England, by the statute 12 Geo. I. c. 29, certain requisites must be complied with, before any one can be arrested on civil process. The courts strictly require a positive affidavit; the sum must be specified in it, which sum must be endorsed on the back of the writ or process: for which so endorsed the sheriff shall take bail, and for no more. If no such affidavit and endorsement be made, the defendant is not to be arrested, let the amount of debt be what it may. 1 *Sel. Prac. Introd.* 59.

In this State, it has long been the practice to issue the *capias* without any affidavit, except in a very few cases sounding exclusively in damages, on which the attorney directs the endorsement of such bail as he may think sufficient. If the defendant think himself aggrieved, he may apply to a single judge in vacation, or to the court in term time, to be discharged on common bail; or to have it mitigated. Until application is made to the judge or to the court, the affidavit of the debt is seldom made; and even then the plaintiff's attorney often obtains time to notify the plaintiff to come in and make the requisite affidavit. Many of those suits are brought with a view to submit them to arbitration, under the law of 1806, by which means they partially obtain, it is said, the benefit of a bill of disclosure; acquiring from the investigation before the arbitrators, the evidence of a cause of action they had nothing but a mere suspicion of before.

By the rules of court, where the affidavit is not positive, but yet sufficient to convince the judge that there is good cause of action, especially where it is founded on a bond, note, letter, or other paper signed by the defendant, the judge may, at his discretion, hold the defendant to bail: thus giving a power to the judge to dispense with the production of a positive affidavit of the debt and the amount thereof, if a paper signed by the defendant is produced. The rule indicates in strong terms, and in language that cannot be misunderstood, that a bond signed by the defendant is a probable cause of action. These matters have been brought into view for the purpose of shewing, that instead of relaxing the restrictions and limitations to which a malicious and vexatious suit is subjected in the courts of Great Britain, there is every reason here, that exists there, with many additional ones peculiar to this State, arising out of the nature and mode of our proceedings, why these restrictions and limitations should be increased and not diminished. In the case of *Sterling* against *Adams*, reported in 3 *Day*, 411, in which most of the cases are brought under review, analyzed, commented upon, and contrasted with great ability, the counsel for the plaintiff admitted "that a person must be guilty of a very gross abuse of the right of suing, before he will be liable for vexation. To the ex-

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ercise of that right great indulgence is given. If the object of the plaintiff be in any degree to obtain right, his temper is not to be regarded. When all the facts, known or believed by the plaintiff, or existing without his knowledge, would afford any probability to an honest mind that there ought to be a recovery, probable cause in law exists, and a suit, however unsuccessful, injurious, or vindictive, will entitle the defendant to no remuneration. Here is often great wrong and no remedy—it is “*damnum absque injuria*.” A man, from a malicious motive, may take upon himself a prosecution for real guilt, or he may from circumstances which he really believes, proceed upon the apparent guilt, and in neither case, is he liable to this kind of action, 6 *Mod.* 73. To support it there must be express malice, without any colour of cause. *Holt* 4. 6 *Mod.* 25. He may therefore from malicious motives, proceed to collect a real debt by the process of *capias* and bail, or he may from circumstances which he really believes, proceed upon the apparent evidence of debt, to collect it by *capias* and bail, and in neither case be liable to an action for vexation. The plaintiff's declaration in this action shews, that there was a probable cause for the original suit. It admits the suit was founded on a bond given to the testator, *Ludwig Zearing*, in his lifetime. Want of probable cause cannot be implied from an acquittal of a defendant in a criminal prosecution, or a failure to recover in a civil suit. 2 *Selm. N. P.* 1057 *is note 2.* *Day's Coke upon Litt.* 161, *a*, *note 297.* Although an action for a malicious prosecution will lie, it is not to be favoured. 1 *Salk.* 15. *Bul. N. P.* 14. 1 *Wilson*, 231. It is difficult to define with precision in what cases, and under what circumstances this action will lie. It may however be safely laid down as a general proposition, that, where in the original action the defendant is obliged to set up some collateral matter by way of justification, or defence, which does not appear on the declaration, or the face of the instrument declared on, probable cause is admitted. This proposition is supported by precedent and reason. 3 *Day's Rep.* 432. These principles when viewed collectively, manifestly shew, that the plaintiffs' in error had sufficient probable cause to shield them from this action, even if the suit had been against them in their individual capacity. But this suit is clearly against them in their representative capacity as executors. It is for acts done by them as executors. The declaration recites that the writ was issued by them as executors on a bond given to the testator, and the proceedings which took place on that writ, as the foundation of defendant's claim, to damages. But it is contended that all these recitals may be rejected as surplusage, as merely descriptive of the persons; and so the court below charged the jury. The answer to this position will be found in *Robins v. Robins*, 1 *Salk.* 15, in which the complaint was that the plaintiff caused the defendant to be arrested and held to bail,

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where by law, no bail was required—*Per Holt, Ch. Jus.* "This is a tender action, you must shew that the plaintiff being indebted to the defendant in so much, the defendant took out such a writ for so much more, on purpose to hold him to bail, you should set out the writ." If it is necessary to set out the writ in the original suit, it is equally true, that it is necessary to prove it as set out. The record of the original action must be produced on the trial, and given in evidence 2 *Sels. N. P.* 1062. It must correspond with allegations in the declaration, or it cannot be given in evidence. It therefore cannot be considered as surplusage. It is an essential and material allegation without the proof of which the plaintiff could not support his action. The declaration ought to set forth the sum due, and the process specially, and that the first action is determined. See 2 *Sels. N. P.* 1060. *Yelv.* 110. The action then is against the plaintiffs in error as executors, for acts done by them as executors. It is the first attempt, it is believed, that ever has been made to support such an action. No such case has been produced, and it is believed none such can be found in the books, or the industry of the defendant's counsel would have discovered it. It would be an extension of the remedy by this kind of action, which, it has already been shewn, ought never to be permitted. Executors can only be made liable in their individual capacity, if at all, for acts done by them in their official character, by such irregular, improper and gross misconduct as would render them trespassers *ab initio*. In such a case, *trespass vi et armis*, and not *case* would be the remedy.

Deplorable would be the situation of executors, if they would be made liable in actions for vexatious suits. They are bound to use every diligence in collecting decedent's debts. Not only to know themselves that they could not be recovered, but to be able to shew satisfactorily in the settlement of their accounts, to a querulous legatee or creditor, that they could not be collected. They may know a book debt or note is barred by the statute of limitations; but they cannot know that the debtor will avail himself of that defence. They may know that a bond will be presumed to have been paid from lapse of time; or that the obligor has some defence arising out of other transactions, or depending on some collateral matters involving intricate questions of law and fact. But they are not therefore to refrain from bringing suit; nor to be deterred from doing so, by being in danger of subjecting themselves to an action for vexation. This would be contrary to policy and common sense, because it would be to say to them if you neglect to enforce the collection of the decedent's debts with all due diligence, you shall be liable for such neglect, but if you attempt to do it, by the ordinary process of the law, you must run the risk of rendering yourselves liable to a vexatious and malicious suit. This would be

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placing executors on the bed of *Procrustes*. It therefore appears that on an examination of this cause on principle, this action cannot be supported. The charge of the court on the first point that it could be supported, and that styling the defendants executors, was merely personal description, was incorrect. If it be examined by a comparison with the decisions in each particular case, where the question has arisen, what shall amount to a reasonable or probable cause, it will be found that the court were equally incorrect. In this cause, the bond to the testator in his lifetime, coming to the hands of the executors, appearing on the face of it, to be due and unsatisfied, was much stronger probable cause than has been considered in most cases found in the books, sufficient to protect plaintiffs from actions for malicious prosecutions or vexatious suits. Many of the cases will be found collected in *Day's note to Coke upon Litt.* page 161, *a*, note 297, and in 3 *Day's Rep.* 411. *Selw. N. P.* 1057-8. A sufficient probable cause is laid in the defendants declaration in this very action; no averment being laid that the plaintiff knew the bond was paid, or in any way satisfied. The question of probable cause is a mixed proposition of law and fact. Whether the circumstances, alledged to shew it probable or not probable, are true and existed, is a matter of fact; but whether supposing them true, they amount to a probable cause, is a question of law. 1 *Wilson*, 232. *Day's Coke upon Litt.* 161, *a*, note 297. *Bul. N. P.* 14. The plaintiffs in error had, clearly, reasonable and probable cause for arresting the defendant and holding him to bail. The court should have so instructed the jury. They should have informed them that the fact not being disputed, but expressly set forth in defendant's declaration, that the original action was founded on a bond, which was given to *Zearing* in his lifetime, and which came to the hands of plaintiffs in error as executors, appearing on its face to be due and unsatisfied, was a sufficient probable cause to justify the plaintiffs' in error in arresting and holding defendant to bail, and that the verdict must be for the plaintiffs' in error. There was also error, therefore, in the charge on the fourth and fifth points. The other points of the charge are too vague to give any accurate information to the jury. Upon the whole, it sufficiently appears that in this cause, the plaintiff below should have been nonsuited, or not permitted to sustain his action.

Judgment reversed.

1 PW 240  
28 SC 373

**SAMUEL FINNEY'S** administrators, *against* the COMMON-WEALTH OF PENNSYLVANIA, for the use of **JOHN ALLEN**.

IN ERROR.

Lien creditors are to look to the application of the fund on which they have a lien, at their peril: every thing, which a due attention to their interest would have entitled them to receive, being considered as paid by operation of law, as regards the debtor.

The defendant in a judgment on a recognizance for the price of land, taken at a valuation in the Orphans' Court, gives security for the stay of execution allowed by the act of assembly; after which the land is sold by the sheriff, and the money brought into court. The plaintiff, and other persons entitled, agree that the debts of a deceased brother, who died in the lifetime of the father, should be paid out of his estate, as liens, although in point of fact they were not liens, and the proceeds of sale are thus exhausted, and not applied to pay the judgment, which was a lien; *Held*: That the liability of the surety on the recognizance was discharged, and the agreement of the defendant in the judgment to the misapplication of the fund will not, as respects the surety, alter the case.

ERROR to the Court of Common Pleas of the county of Dauphin.

This was a *scire facias* at the suit of the Commonwealth of Pennsylvania, for the use of *John Allen*, one of the heirs and legal representatives of *Joseph Allen*, deceased, against *Ann Finney*, *Thomas Finney* and *William Finney*, administrators of *Samuel Finney*, deceased, bail of *James Allen*, issued upon a recognizance entered into by *Samuel Finney*, as the surety of *James Allen*, to obtain the stay of execution under the act of assembly, upon a judgment in favour of the plaintiff against the said *James Allen* and *Christian Forney*. This judgment was obtained on a recognizance given by *James Allen*, with the said *Forney* as his security, in the Orphans' Court, upon taking the real estate of his father, *Joseph Allen*, deceased, at the appraisement. The recognizance, on which this *scire facias* issued, was entered into by *James Allen*, the defendant, on the 3d of January, 1820; and the plaintiff in the judgment, to December term, 1820, issued an execution thereon, which was levied on the land of *James Allen*, and that was sold for three thousand and fifty dollars, which was brought into court, and auditors appointed to ascertain the debts due by *Joseph Allen*, deceased. These auditors reported the debts due by the estate of *Joseph Allen*, deceased, which amounted to the sum of seven hundred and twenty-eight dollars and twenty-five cents; and also, that by an agreement of the surviving heirs and legatees (of whom the plaintiff *John* was one,) of the said deceased, in writing, it was stipulated that the executors of the said deceased should pay the debts of *Tristram Allen*, one of the sons of *Joseph*, who died in his fathers lifetime, out of the estate of the said *Joseph*, and that considering the debts of *Tristram*, under this agreement, as the debts of *Joseph*, they reported those debts. They amounted to the sum of two thousand four hundred and fifty

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dollars; and among them there was a judgment in favour of *Samuel Finney*, the defendant's intestate, for one hundred and thirty-six dollars and sixty-eight cents. The report on the 24th March, 1823, was confirmed by the court, and a decree made that the money should be paid over according to the report.

This *scire facias* was brought to April term, 1823, and a verdict under a charge of the court favourable to the plaintiff, which was excepted to, having passed for the plaintiff, error was brought by the defendant.

*Fisher*, for the plaintiff in error, argued, that the application of the proceeds of the sale of the real estate of *James Allen*, to the payment of the debts of *Tristram*, (which were no lien on the fund,) by the agreement of the plaintiff, instead of applying them to pay his judgment against *James*, which was a lien, discharged the liability of the defendant on his recognizance upon that judgment.

Any act of the obligee which affects the surety will discharge him. *Commonwealth v. Miller*. 8 Serg. & Rawle, 452. *Diermond v. Robison*, 2 Yeates, 324. Here the means of satisfaction were in the hands of the plaintiff, he parted with them, and cannot now resort to the surety. *Ludlow v. Simond*, 2 *Caines Cases in Error*, 29. 30. By any act which changes the situation of the surety he is discharged. *Rathbone v. Warren*, 10 *Johns. Rep.* 588. 590. 3 *Wils.* 539. *Phillips v. Thompson*, 2 *John Ch Rep.* 418. *Bellas v. Haas*, 16 *Serg. & Rawle*, 252.

*Douglas and Elder*, contra.

The opinion of the court was delivered by

GIBSON, C. J.—In the bank of *Pennsylvania v. Winger*, 1 *Rawle*, 295, it was held, that, lien creditors are to look to the application of the fund at their peril, every thing which a due attention to their interest would have entitled them to receive, being considered as paid by operation of law as regards the debtor. So little was this principle doubted that some of the judges inclined to think it superior to the equity of a creditor who has but one fund, against a prior creditor who might otherwise resort to either of two; and it was barely held that it is not. But no one entertained the least doubt that where the creditor is entitled to satisfaction out of the proceeds of the land both at law and in equity, a loss shall be borne by him whose supineness occasioned it; much more so, where it has been produced by his positive agency. What then is the case here? The defendant in a judgment on a recognizance for the price of land taken at a valuation in the Orphans' Court, gives security to entitle himself to the stay of execution allowed by the act of assembly, after which the land is sold by the sheriff and the money brought into court. The plaintiff and the other persons entitled to the estate of the decedent, appear before auditors appointed to report the state of the

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liens, and agree that the executors of a deceased brother who had died in the lifetime of their father, should pay his debts out of the estate, in consequence of which, these debts are reported and paid as liens, although indisputably not so in fact; and the proceeds of the sale being thus exhausted, the plaintiff proceeds on the recognizance given to obtain a stay of execution. Now, to say nothing of the rule which protects a surety, where the creditor has parted with the means of obtaining satisfaction from the principal, it is plain, here, that if the levy and sale were actual satisfaction of the original judgment, there could be no breach of the condition of the recognizance. But no one will pretend that the plaintiff could have had further recourse to the original debtor, had he not consented before the auditors, to apply the proceeds of his land to the payment of his deceased brother's debts. But he had no right thus to consent, in prejudice of the rights of his surety for whose indemnity the land stood pledged by the lien of the judgment, to the benefit of which he would have become entitled by payment of the debt, but of which benefit he will be deprived, if he is compelled to pay it now, after the fruits of the lien have been swept away by a misapplication of them. The consent of the original defendant, then, being fraudulent, is to be laid out of the case, and the original judgment treated as if it were satisfied even as to him; and if so, it would be strange, if payment by him would not discharge the debt in favour of his surety. Any other construction would enable the children to manage matters so as not only to enjoy the full benefit of their father's estate, but to cast the burthen of a deceased brother's debts upon a stranger; and this monstrous result would be established by confirming the judgment of the court below. On the other points touched, but not pressed, we deem it unnecessary to express our opinion.

*Rogers J.* and *Huston J.* did not hear the argument, and took no part in the judgment.

Judgment reversed.

## ROAD from the JONESTOWN ROAD, to the UNION CANAL RESERVOIR.

A practice in the court of Quarter Sessions of appointing *twelve* freeholders as reviewers of a road, from which the parties in interest shall strike six, the remaining six being the reviewers, is contrary to the express provision of the law, and erroneous. But when the petitioners for the review pray for the appointment of *twelve*, and then refuse to strike, because some of the persons appointed are exceptionable, it is not error in the court of Quarter Sessions to refuse to appoint others in the place of those four, and confirm the view.

*CERTIORARI* to the Quarter Sessions of Lebanon county.

At August sessions, 1828, a petition was presented for a view of a road, which was granted. The viewers reported in favour of the road, to November sessions, 1828, to which exceptions were filed, which upon argument were overruled, and the report confirmed *nisi*, when those who were opposed to the road petitioned the court to appoint, (according to their practice,) *twelve* freeholders, from whom the parties might strike six, and the remaining six should review the said road. The court having appointed the *twelve* freeholders, the parties met in vacation, as was the custom, to strike three each, when the petitioners discovered that four of the twelve nominated by the court, were relations of the petitioners for the view, and for that reason refused to strike, but at the next sessions petitioned the court to appoint others in their room. This the court refused to do, and on motion confirmed the report of the viewers.

There were several errors assigned, none of which were insisted upon, but one. That the court erred in not appointing a competent number of freeholders to review the road.

*Weidman*, for the review.

*Norris*, for the view.

The opinion of the court was delivered by

HUSTON, J.—The complainants in this case have filed a number of exceptions to the petition for, and report of this road. There is no ground for any of them, except one; and that one not filed until more than a year after the return to this court. The first section of the act of the 6th April, 1802, for laying out roads, &c. directs, that the court, on petition, shall in open court, appoint six discreet and reputable freeholders, &c. to view, &c. In the twenty-second section, it is enacted that in all cases where the court of Quarter Sessions are authorised to grant a view, for laying out a road, &c. they are hereby authorised and directed, on application to them made for that purpose, to grant a review of the same, at the expense of the parties applying: provided, the application be made



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at the next term of the Quarter Sessions after the report has been made on the first view. The evident meaning of the law, the usage under it, and the former act of which it is in this respect a transcript, is, that the review is to consist of six discreet and reputable inhabitants, and like the viewers, they have been, and ought to be appointed in *open court*. To be sure, when the names of the reviewers are announced, it sometimes happens, that one or more of them, is objected to in open court, as being connected, in some way, with the parties contending, or as being affected by the location of the road, and in such case the court substitute the names of other persons, free from objection; all this, however, is done in open court. It seems there is a practice in Lebanon county, that the court make a list of twelve reviewers, and this is left in the office of their clerk, and after the court, those in favour of, and those opposed to the road, each strike out three names, and the remaining six are the reviewers. No practice can be more calculated to produce unfair results than this. No one of the petitioners is authorised to strike for the rest. Any one of the petitioners for the view, or for the review, may then appear and select men to suit his individual purposes. It was no doubt adopted as a rule, to save trouble to the court, and under an idea that it was fair. It has not, however, the sanction of the law, and the unanimous opinion of this court is, that it is a bad and illegal practice. No one county, nor several counties, can adopt a usage contrary to the rest of the State, and to an express provision of the law. On the return of the report in this case, certain persons presented a petition to the court to appoint *twelve reviewers*. The court did so; after the court, the parties, or some of them, and their respective counsel, met to strike out three each. The petitioners for the review objected to the list, because a brother of one of ~~the~~ persons who petitioned for the road, was one of the twelve. To be sure he could be struck off, but that would not satisfy, they refused to strike altogether. There was of course no review, and the court confirmed the first report, and the other party took their *certiorari* to this court. Certainly if the court of Quarter Sessions had refused to grant a review, it would have been error, or if the petition had been to appoint six reviewers, and the court had appointed twelve, it would have been error. The party, however, and the court acted under their own rule. The object of that rule was to give six reviewers, to none of whom any exception could be taken. If the name objected to, had been struck by those objecting to him, the rest of the list would have been unobjectionable, which was all that in reason any party could ask. Every court must have the construction and application of its own rules; and it must be a strong case in which we will reverse, because a court put a wrong construction on its own rule. The Quarter Sessions thought the conduct of the complainants captious,

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and intended for delay, and they thought the object of their rule was to give an opportunity of obtaining a review, composed of men, to none of whom there was any exception. There was such opportunity given in this case, and if no review was had, it was owing to the fault of the petitioners; a majority of the court overrule the exceptions, and affirm the proceedings of the Quarter Sessions, because we are unwilling to sanction the conduct of parties, who by their own mistakes, or their own obstinacy, occasion irregularities, and then endeavour to take advantage of them, by applying to a superior court.

Proceedings affirmed.

SMITH, J. and Ross, J. dissented.

| GEORGE ULRICH, with notice to HENRY NEWMAN, terre-tenant, against JACOB VONEIDA.

A bond, with a warrant of attorney to confess judgment, authorizes the entry of but one judgment: the entry of a second, upon the same warrant, is wholly irregular.

It is competent for a terre-tenant, who is brought in by *scire facias* to revive a judgment, to show that the original judgment was entered without authority, was fraudulent, or otherwise wholly irregular.

ERROR to the Common Pleas of Lebanon county.

On the 15th February, 1820, a judgment was entered in the Common Pleas of Lebanon county, by virtue of a warrant of attorney, *Jacob Voneida v. George Ulrich*, for five hundred dollars, and within the period of five years, to wit: to April term, 1825, a *scire facias* issued to revive that judgment, with notice to *Henry Newman*, then terre-tenant of the land bound by the original judgment. At August term, 1825, the defendant filed an affidavit of defence and pleaded, *payment with leave, &c.* The cause was then removed into the Circuit court, from which it was remanded to the Common Pleas, in May, 1828, where it was down for trial in August, 1828. On the 7th August, *Weidman*, attorney for the defendant, moved the court for a rule to show cause why the entry of the original judgment should not be stricken from the record, together with all entries and proceedings thereon; on the ground that a judgment had been previously entered, upon the same warrant of attorney, in the county of Berks. On argument, the court refused to grant the motion. 14th August, 1828, the defendant entered the plea of *nil tiel record*, upon which issue was joined, which the court proceeded to try. The plaintiff having shewn the original judgment in Leba-

1 PW 245  
e. 23 SC '595

206 '204  
22 SC '312

1 PW 245  
e208 '647

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non county; the defendant, to maintain the issue on his part, called upon *Norris*, the plaintiff's attorney, to produce the bond and warrant upon which the original judgment was entered, which he refused to do. The defendant then gave in evidence the copy of a record of a judgment entered on the 14th February, 1820, in the county of Berks, on a bond and warrant of attorney of the same date and terms, as were recited in the judgment which was then trying. After argument, the court decided in favour of the plaintiff, to which exception was taken by the defendant.

The defendant's counsel then asked permission to add the plea of *non est factum*, as to the bond and warrant, upon which the original judgment was entered, and that said judgment was entered without authority. This plea was objected to by the plaintiff's counsel, and rejected by the court, to which exception was taken by defendant.

The jury being then sworn, and the plaintiff having given in evidence the record of the original judgment, the defendant's counsel asked the court to discharge the jury, and delay the trial of the cause, upon his exhibiting the record of a judgment entered in the county of Berks, upon the same warrant of attorney, but prior to the entry of the judgment in the county of Lebanon, and upon parol proof, that an endorsement on the said bond and warrant, which was then in possession of plaintiff's attorney, shows that the judgment in each county was entered upon the same warrant, and then again asked the court to grant the defendant a rule to shew cause why the original judgment should not be vacated and stricken from the record; which motion was refused by the court, and to which the defendant took exception.

The defendant, having proved a notice to *Norris*, counsel for plaintiff, to produce the bond and warrant of attorney, upon which the original judgment was entered, offered parol evidence that there was an endorsement on said bond, showing that a judgment had been entered by authority thereof, in the county of Berks, prior to the entry in the county of Lebanon, which was objected to by the plaintiff, the objection was sustained and exception taken by defendant. The defendant then offered the record of the judgment in Berks county, to show fraud in the plaintiff, in entering the same judgment again in Lebanon, which was objected to, overruled, and exception taken by defendant. A verdict and judgment for the plaintiff were rendered in the court below, and this writ of error was sued out by the defendant. Errors were assigned in the opinion of the court, as contained in the several bills of exception.

*Weidman*, (with whom was *Kline*), for plaintiff in error, admitting the rule that a record, when its validity is put in issue in

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the same court, must be tried upon inspection, yet contended, that this case did not come within that rule, for by the 28th section of the act of 24th February, 1806, *Purd. Dig.* 409, a special mode was provided of creating a lien upon real estate. The prothonotary is authorised to make an entry of a note, bond or other instrument of writing, which contains an authority to confess judgment against the party, and the same shall be a lien on his real estate. There is no act of the court necessary, nor can any be legally exercised, it is not therefore a judgment of the court which must be tried by inspection, but if fraud on the part of the prothonotary, or want of authority, shall be alleged, like all other facts they must be referred to the jury.

If the court had a right to try these facts, they should have decided in favour of the defendant. In *Martin v. Rex*, 6 *Serg. & Rawle*, 296, the very point which arises here is settled, that a judgment entered upon a warrant of attorney, upon which a judgment had been previously entered in another county, is irregular: in this case the court had all the facts before them, which made it abundantly plain that this warrant of attorney was *functus officio* by the entry of the judgment in Berks county, the same is laid down in *Fairchild v. Camac*, 3 *Wash. Ct. Ct. Rep.* 558. The court erred also, in refusing the special plea offered by the defendant: by the act of the 21st March, 1806, section 6, *Purd. Dig.* 411, the right to alter the pleadings, so as to effect the merits of the cause, is given even upon the trial; and to refuse that right is error, *Sharp v. Sharp*, 13 *Serg. & Rawle*, 445. The case of *Hartzel v. Reiss*, 1 *Bin. Rep.* 291, supports the position that upon the trial of the *scire facias* suit, even *Ulrich*, the original defendant, might have given in evidence, that the original warrant of attorney was exhausted. The rule of law that no evidence shall be given as a defence to a *scire facias*, which goes to effect the legality of the original judgment, only applies to parties and privies to that judgment, and it is always competent for a third person who becomes interested, to show that the judgment is illegal or fraudulent; and this may be shown, even in a collateral action, *Griswold v. Stewart, et als*, 4 *Cowen's Rep.* 457. Here *Newman*, the terre-tenant, was a purchaser of the land for a valuable consideration, and the first opportunity which the law afforded him to defend against this illegal judgment, was taken advantage of. He could not have sustained a writ of error to reverse the original judgment, *Bul. N. P.* 232. *Newman* having therefore done every thing which he could do, to divest his land of this illegal lien, the court having refused to open the judgment, unless he can avail himself of his defence in the *scire facias*, his case is an anomaly in the law—a legal defence without an opportunity of making it. It was certainly competent

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for the defendant to show, that the plaintiff acted fraudulently in entering the judgment a second time, and that the prothonotary knew the fact also, that the judgment had been entered before, and fraud is a matter of fact for the jury; and if found by them, it would have destroyed the plaintiff's right to recover, 1 *Madd. Chan.* 300, but the court would not permit us to give this evidence.

*Norris*, for defendant in error.

The motion by defendant's counsel on the 7th August, 1828, to vacate the judgment, was the legal and only remedy of the party complaining of the entry of the judgment without authority. *Cook v. Jones*, *Comper's Rep.* 227. 2 *Strange*, 1043. *Cases Temp. Hardwick*, 220. *Strong v. Tomkins*, 8 *Johns. Rep.* 77. *Cassell v. Cooke*, 8 *Serg. & Rawle*, 296. *Neff v. Barr*, 14 *Serg. & Rawle*, 166. *Lysle v. Williams*, 15 *Serg. & Rawle*, 135. *Kabach v. Fisher*, 1 *Rawle Rep.* 323.

The defendant, upon his motion to vacate, was fully heard. All the evidence offered on the trial, under the plea of payment and notice, was given to the court, and after hearing it, and the counsel of *George Ulrich*, in support of it, the court rejected the application. This judgment upon motion, and on a disclosure of the merits of the defendant, is decisive against him. It is a *res judicata*. 17 *Serg. & Rawle*, 278. 6 *Term Rep.* 471. 7 *Term Rep.* 155, cases under the annuity act of 17. *Geo. III. ch.* 36. After the judgment of the court, on the motion, another trial of the same matter could not be granted to the defendant in the same or any other court, under any form or course of proceeding. All the evidence therefore offered by the defendant on the trial under the plea of payment, to impeach the validity of the original judgment was properly excluded, and this disposes of the 2d, 3d, 4th and 5th bills of exception. But, for another reason, this evidence could not be received. To a *scire facias* upon a judgment, and under the plea of payment, the law is settled that in *no case*, under any circumstances, can the validity or merits of the original judgment be enquired into for the purpose of furnishing a defence. Where a judgment has been obtained surreptitiously, it will be vacated on motion: and where it is suffered by confession or default, if there be a defence, the court will open the judgment and let the defendant into a trial. *Comper*, 727. 8 *Johns. R.* 77. 1 *Bin.* 289. 4 *Bin.* 61. 1 *Serg. & Rawle*, 540. 5 *Serg. & Rawle*, 65. 11 *Serg. & Rawle*, 155. 15 *Serg. & Rawle*, 135. 1 *Rawle*, 323. 14 *Serg. & Rawle*, 170. The issue in law, upon the plea of *nul tiel record*, embraced in the first bill of exceptions, was tried by the court, and found for the plaintiff. Error cannot be conceived in this, and therefore none has been shown. To the decision of the court upon the issue in law, on the plea of a former recovery, the plaintiff in error, has not excepted in the court below—nor is it assigned for error in this court. Even on the argu-

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ment, the counsel for the plaintiff in error did not ask the court to permit him to assign this as a matter in which there was error. But there is no error in the replication to the plea, nor in the trial and judgment. The plaintiff may and must reply to a plea of a former recovery for the same cause of action—first, *nul tiel record*, upon which issue is taken in law to the court, and tried by the court, and if the finding be for the plaintiff, the plea is entirely disposed of. But if the plaintiff do not choose to rely upon the non-existence of the record of the judgment, he may in the second place, together with the denial of its existence, deny or traverse the fact of the recovery being for the same cause; and the issue is then a mingled one of law and fact, and from our decisions in Pennsylvania, it appears must be tried by the jury. No formal judgment upon the existence of the record is entered by the court. The jury find for the plaintiff or defendant, and judgment is passed upon the verdict. There is no error in this. The want of a formal judgment by the court upon the plea of *nul tiel record*, when it appears with the plea of payment, and all is found by the jury, is not error. 8 *Serg. & Rawle*, 228. 6 *Serg. & Rawle*, 544—573.

The plea of a former suit pending, like all the rest, (excepting payment with leave,) was offered on the trial of the cause. The rejection of it requires no answer. A plea in abatement, after a plea in bar, cannot be received, and if received, it is a nullity. 4 *Serg. & Rawle*, 238. 15 *Serg. & Rawle*, 150. The alleged record of a recovery in Berks, for the same debt, is offered in the fifth bill of exceptions as evidence to the jury of fraud in the plaintiff. Under the plea of payment to the *scire facias*, fraud in obtaining the original judgment cannot be given in evidence. 10 *Serg. & Rawle*, 240. 13 *Serg. & Rawle*, 254. Finally, the justice of the case is with the verdict. For if it were true that judgment had been entered in Berks upon the same bond and warrant of attorney, it appears by the defendant's plea of a former recovery, that the judgment in Berks alleged to be for the same debt, was on the 15th August, 1828, at the time of the trial wholly unsatisfied; and that not a cent of the debt for which this verdict was given, had ever been paid. *George Ulrich* is insolvent. He had no real estate in Berks county, in 1820, and nothing there which the alleged judgment could bind. He then, and since, has resided in Lebanon county. He then owned a tract of land on Millback mountain, in Lebanon, intended and fixed by our judgment for the payment of this debt: And to defeat it, he assigned all his land in 1824, to his uncle, *Henry Newman*, the terre tenant. *Newman*, aware of his connexion with his nephew *George*, in relation to this judgment, when called in as terre-tenant, by the *scire facias*, did not dare to take defence. He therefore has no cause to complain of the ver-

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dict and judgment. Would a court of justice, under these circumstances, relieve the defendant on motion and vacate the judgment in Lebanon? Surely not. Vacating the judgment would vacate the debt for ever. But assuming the fact that the judgment was first entered in Berks, a chancellor would only grant relief on terms; on securing or paying the debt. 1 *Maddox Chancery*, 225. 14 *Serg. & Rawle*, 170.

The opinion of the court was delivered by

SMITH, J.—His honour, after having fully stated the case, said—The errors assigned, impeach the several decisions of the court of Common Pleas, and present as the principal question for our consideration, this point, whether it is competent for the terre-tenant, in this *scire facias*, to object to the original judgment, by showing that it was entered without authority, or fraudulently?

With regard to the parties to that judgment, it is conceded, that nothing which would have been a defence in an action upon the bond, could be pleaded or given in evidence upon the *scire facias*. But the terre-tenant, who is neither party nor privy, is he concluded? *Henry Newman* purchased the land of the defendant, for a valuable consideration, after the judgment was entered in Lebanon county. Until the *scire facias*, with notice to him, was issued, he had, however, no opportunity of questioning its validity. By that writ, he was made a party in interest, and called upon to defend his property, against the operation of the original judgment. The effect of the notice was not merely that he should show cause why execution should not issue, but why it should not issue against the land in his possession, charged with the lien of the judgment. To deny him the right of impeaching the judgment, would be to take away his only remedy, and make the call upon him for a defence, by the notice of this *scire facias*, a mockery. In 2 *Salk*. 600, Chief Justice *Holt*, says, “upon the *scire facias*, the terre-tenants will have notice, and they, being strangers to the judgment, may falsify it.” See, also, 4 *Cowen’s Rep.* 457. This we consider to be the rule of law, which must govern the present case, and therefore decide, that it was competent for *Henry Newman*, to shew that the judgment, on which the *scire facias* issued, was entered without authority, or fraudulently entered. It has been repeatedly determined, that a bond with a warrant of attorney to confess judgment, authorises the entry of but one judgment; and accordingly that when judgment is once entered, the warrant becomes *functus officio*. A second or subsequent judgment by virtue of the same warrant, is therefore, wholly irregular. *Add. Rep.* 267. 3 *Wash. C. C. Rep.* 558. *Martin v. Rex*, 6 *Serg. & Rawle*, 206. 14 *Serg. & Rawle*, 170.

The court of Common Pleas erred, in denying to the terre-tenant all opportunity of showing, by pleading it specially, or by evidence,

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under the plea of payment, with leave, &c. that the powers of the warrant of attorney by which this judgment was entered in Lebanon county, had been satisfied by a previous judgment, entered on the same bond and warrant in Berks county. We do not think that the decision of the issue upon the plea of *nul tiel record*, precluded the terre-tenant from subsequently pleading or showing by evidence, the fact of a prior judgment, entered upon the same warrant in Berks county. The question on that issue was this, is there such a judgment in Lebanon county as is set forth in the *scire facias*. This was to be determined upon inspection, and the judgment was shown. But although the record was fair to the eye; and although this was sufficient to justify the decision, yet the terre-tenant might, without inconsistency, have been permitted to prove that it was irregular for the reasons before mentioned, and ought not in good conscience, to be executed upon his land. In addition to this, as a judgment has the effect of merging the bond in it, it may fairly be enquired, on another trial, whether a second judgment could afterwards be had thereon in another county. See *Clement v. Bursh*, 3 Johns. Cases, 180. We are of opinion, therefore, that the judgment should be reversed.

GIBSON, C. J.—Except for excess of jurisdiction, the judgment of a court of record is never void, 3 Inst. 321. Letters of administration can be vacated only by a judicial sentence, *Cro. Eliz.* 315; and an order of justices of the peace likewise, being a judicial act, is not *ipso facto* void, but good till it is quashed, 2 Salk. 674. So the judgment of a superior court is voidable only on error, (*id.*) even in the case of an outlawry, which is expressly declared to be void by a statute, 1 Rol. Rep. 159; and a judgment on warrant of attorney is, in contemplation of law, a judgment rendered by the court. On the plea of *nul tiel record*, then, how could the court below enquire whether the authority on which the judgment was entered, had been exhausted by entering a previous judgment in another county? The defendant had no remedy, but an application to have the judgment set aside, and to that he had had recourse without success, and probably for a good reason. No one will pretend that a second recovery for the same cause is merely void, or, where the previous recovery has not been pleaded, even erroneous. The court below, then, had before it a judgment irregular, if you will, but unreversed, which in a collateral proceeding between the same parties, it was proposed to destroy. In *Share v. Becker*, 8 Serg. & Rawle, 241, the defendant in a *scire facias* on a judgment upon a report of arbitrators, was not permitted to gainsay the judgment by evidence of irregularity in the proceedings, which is the very case at bar; and in the lessee of *Hiester v. Fortney*, 2 Bin. 40, it was held that a judgment on a *scire facias*, after one *nilil*, which of course might



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have been set aside or reversed on error, can not be questioned collaterally in another suit, and the same doctrine was asserted in *King v. King*, ante, 19. There is an endless list of authorities for this familiar elementary principle, which is the foundation of even the English practice in setting aside judgments surreptitiously obtained on warrant of attorney, without which, it is said, the party would be without remedy\*—in other words, he would not be able to take advantage of the irregularity on a *scire facias*, by evidence or pleading. On the plea of *nil tiel record* therefore, it seems to me the court did right to give judgment for the plaintiff.

ROGERS J. concurred with GIBSON, C. J.

Judgment reversed, and a *venire de novo* awarded.

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\* See *Cook v. Jones*, Cowp. 727-8.—Reporters.

### GEORGE B. PORTER, Esq. against THE COMMONWEALTH OF PENNSYLVANIA.

The account of a Prothonotary being settled by the accountant officers of the State, to which he files his objections in writing, and takes an appeal to the Common Pleas, upon the trial of the cause he cannot give evidence to support other objections than those made at the time of appeal.

Upon the settlement of such account of a Prothonotary out of office, the accountant officer is not confined to the settlement of items embraced, as to date, within the fiscal year.

APPEAL from the Circuit Court of Dauphin county, held by Justice HUSTON.

The defendant, George B. Porter, Esq. was prothonotary of the county of Lancaster, from April, 1818, until February, 1821, when he resigned, and during that time, it was admitted he received fifteen hundred dollars *per annum*.

On the 12th June, 1822, the Auditor General, by a circular letter, called upon the defendant to settle an account of the fees of office received by him, as prothonotary of the Common Pleas and District Court, after he went out of office, to wit, from February, 1821, till the 1st July 1822. In pursuance of this call, the defendant, on the 17th July, 1822, furnished an account of the fees received by him from his successor in office, and others, amounting to nineteen hundred and sixty-five dollars and twenty cents. In April, 1824, the Auditor General and State Treasurer settled the following account:

(George B. Porter, Esq. v. the Commonwealth of Pennsylvania.)

DR. *George B. Porter, Esq. late prothonotary, &c. of Lancaster county.* To the Commonwealth, in account for surplus fees of office:

To fees received from the time he resigned until the 1st July, 1822, per his return on oath,	\$1965 20
Deduct, for error made by him,	75 91
	<hr/>
	1889 29
1822, November 2d, received of <i>F. A. Muhlenburg,</i> Esq. prothonotary, per receipt filed,	868 32
	<hr/>
	2257 61
Deduct 50 per cent. thereof, to which he is entitled, agreeably to act of 24th March, 1818,	1128 80½
	<hr/>
Tax due commonwealth,	\$1128 80½
Settled and entered,	<i>James Duncan,</i>
	Auditor General's office, 29th April, 1824.
Approved and entered,	<i>Wm. Clarke,</i>
	Treasurer's office, 29th April, 1824.

From the settlement of this account the defendant entered an appeal to the court of Common Pleas, on the 8th July, 1824, and specified the following objections thereto.

"That the taxation is illegal and improper. The law directs accounts of this kind to be furnished annually to the Auditor General; and the year is to commence and be computed from the first day of October, the account is then to be settled accordingly by the Auditor General; and whenever the amount of such account exceeds the sum of fifteen hundred dollars, the officer shall be charged with fifty per cent. on the amount of such excess, to be paid by him into the Treasury, for the use of the Commonwealth. Whereas the above mentioned settlement is not on an account furnished, nor is the time for which the same is intended as a settlement, stated or known to defendant. It appears to be from 5th February, 1821, to April, 1824. One half of all the fees stated, is charged against the defendant as due to the commonwealth, although the only authority given to the accountant officers to tax an account of this kind is where the fees, in one year, exceed the sum of fifteen hundred dollars. The defendant claims to be allowed fifteen hundred dollars each year clear of tax, and of the excess he is willing to pay fifty per cent. into the treasury for the use of the commonwealth.

"*G. B. Porter.*

"July 8th, 1824.

"To *David Mann, Esq.* Auditor General of the Commonwealth of Pennsylvania."

(George B. Porter, Esq. v. the Commonwealth of Pennsylvania.)

The appeal was filed in the Common Pleas, together with the objections.

In 1826, a declaration in *assumpsit*, for money had and received, was filed; to which the defendant then put in the pleas of *non assumpsit*, and payment with leave, &c, when the cause was certified into the circuit court. On the trial, after the plaintiff had given in evidence the accounts and settlement, as before stated, and rested, the defendant offered in evidence the depositions of *John Mathiot* and *Christian Bachman*, Esquires, which were objected to by the plaintiff and overruled by the Court. The defendant then offered to put in the following plea, which contains the substance of the depositions which had been rejected.

"That on the 12th June, 1822, he was called upon by *James Duncan*, Esq. Auditor General, to render an account upon oath or affirmation, of all fees of office which had been received by him since his resignation or removal, up to the first day of July, 1822: and that he rendered an account in pursuance of this call; the total fees received and returned in said account as corrected, being one thousand eight hundred and eighty-nine dollars and twenty-nine cents: that by an error in the settlement of the amount of fees due by *John Mathiot*, late sheriff, to the defendant, he returned in the said account to the Auditor General, fifty-seven dollars and eight cents, which were not Prothonotary's fees, or due to the defendant, and which have been refunded to the said *John Mathiot*, Esq. And that of the fees so received, and of which an account was rendered to the Auditor General, after deducting the said error of fifty-seven dollars and eight cents, the sum of one hundred and fifty dollars and twenty-seven cents, was fees received in the District Court for the city and county of Lancaster: and that of the sum of three hundred and sixty-eight dollars and thirty-two cents, stated in the claim of plaintiff to have been received by defendant on the 2d November, 1822, the sum of forty-nine dollars fifty-two and a half cents, was fees received in the District Court for the city and county of Lancaster, and which the defendant is not liable to account for, and never assumed to pay. All which he is ready to verify, &c."

The court refused to receive the plea.

The defendant requested the court to charge the jury on the following points of law.

1. That by the existing laws in relation to settling the accounts of those who had held the office of Prothonotary, the Auditor General has power to call on such persons, and compel them to account upon oath or affirmation; but that he must proceed agreeably to the provisions of the act of 10th March, 1810, and must make settlement of the account for each year, ending on the first day of October, and in such settlement can include nothing more than the account for one year: or if he has power to settle the accounts for

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more than one year at one time, such accounts must be settled separately, and the amount for each year, ending on the first October, be kept distinct. That as the Auditor General undertook to call upon the defendant, by letter of the 12th June, 1822, for an account of all fees of office, which had been received by him after his resignation, up to the 1st July, 1822, and defendant rendered an account accordingly; the accountant officers had no right to include in the settlement of the same, the amount of fees which were received in the subsequent year, viz. after 1st October, 1822.

2. That the settlement of the account of defendant as made by the Auditor General and State Treasurer, on the 29th April, 1824, is illegal and improper. No power being given, by law, to the Auditor General to call upon the defendant to render an account of fees received, during the year that would end on the 1st October, 1822, until after the expiration of this year. That even if he had such power, he had no right to include in the settlement of the account, when rendered, any sum paid to the defendant by his successor in office, after the first day of October, 1822; nor had he a right to include in such settlement, fees received for services rendered, while defendant acted as Prothonotary of the District Court for the city and county of Lancaster, in said court.

The court answered these points in the negative; when a verdict was rendered for the plaintiff, which the defendant moved the court to set aside, and grant a new trial for the following reasons:

1. Because the court erred, in rejecting the depositions of *Christian Bachman* and *John Mathiot*, offered in evidence on behalf of the defendant.

2. Because the court erred, in not permitting the defendant to plead the matters as contained in his special plea this day filed.

3. Because the court misdirected the jury, in their charge and answers to the points proposed on behalf of the defendant.

The court overruled the motion, and entered judgment on the verdict; from which the defendant appealed.

*Montgomery*, for appellant, cited the act for erecting the Controller General's office, 2 *Smith's Laws*, 19. Act of 18th February, 1785, 3 *Carey & Bioren*, 9—allowing to accountants a trial by jury, and the general issue to be pleaded; act of 17th March, 1809, *Penn. Laws*, 71, Auditor General appointed to perform the duties of the Controller General; act of 30th March, 1811, *Purd. Dig.* 690, directing the mode of settling the accounts of public officers. By the act of assembly the fiscal year commences on the 1st of October, and the officer is to account annually; the fees are not due to the commonwealth until the end of the year. The Auditor General having therefore called upon the officer to account, and an account having been furnished, the accountant officers had no power upon the settlement of that account, to include the receipt of *F. A.*

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*Muhlenburg*, Esq. for three hundred and sixty-eight dollars and thirty-two cents, dated 2d November, 1822, not within that fiscal year; and they include it too, without any notice to Mr. Porter, or opportunity to contest its correctness.

The defendant is made liable to account, under the act of 1810, consequently he cannot be charged with fees received out of office; that could be done only under the act of 1818. The evidence contained in the depositions which were rejected, was strictly admissible under the general issue, 4 *Yeates*, 349. 2 *Burr*, 1019. 3 *Burr*, 1353. 5 *Serg. & Rawle*, 396. 6 *Serg. & Rawle*, 76. 11 *Johns*. 531. 13 *Johns*. 56. 15 *Johns*. 230. 4 *Yeates*, 366.

Amendments of the pleading on the trial are mandatory, and not discretionary, there was therefore error in refusing the defendant permission to alter his pleas, 13 *Serg. & Rawle*, 444. 6 *Bin.* 88. 4 *Yeates*, 507. 8 *Serg. & Rawle*, 498. 10 *Serg. & Rawle*, 192. 11 *Serg. & Rawle*, 101. 16 *Serg. Rawle*, 117. 5 *Bin.* 53. 8 *Serg. & Rawle*, 286. 6 *Serg. & Rawle*, 295.

*Douglas*, Attorney General, submitted the cause for the state, without argument.

The opinion of the court was delivered by -

GIBSON, C. J.—The act of the 30th March, 1811, requires an appeal from the Auditor General to be accompanied with a specification of the appellant's exceptions, and doubtless to indicate the very points to be determined by the court. As there is no reason to appeal in respect of points that are admitted, it would be flagrantly unjust to permit the accountant to hold in reserve any thing that might have been allowed, had it been urged at the settlement, and thus subject the commonwealth to expense, and her officers to vexation without just cause. The exceptions contained in the defendant's specification are not stated with precision, but they appear to be: 1. That the settlement was not on an account *furnished*. This appears not to have been pressed at the trial. 2. That it includes a period of more than one year. 3. That half of all the fees received in the whole period are charged, instead of the excess above fifteen hundred dollars, in any one fiscal year. These, therefore, are the only points which the court was competent to hear and determine.

At the trial, the defendant offered evidence of various other matters, which was rejected for want of notice, under the rule which requires a specification of special matters, before it can be received, under a general issue plea, on which he prayed for leave to plead the same matters specially, which was refused. It is unnecessary to enquire into the competency of these matters, on either of the grounds on which it was offered, as the fact that it is not included in the exceptions taken before the Auditor General, furnishes an insuperable objection to it on any ground. Perhaps the only ex-

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ception legitimately urged at the trial, is that the account embraces a period of considerably more than a year. But whatever the law may be in relation to the accounts of persons actually in office, the act of the 24th March, 1818, requires the Auditor General to settle the accounts of retired or displaced officers "from time to time." Why the case of the defendant, whose appointment to the office, was subsequent to the passing of this act, should not be embraced by it, we are at a loss to discover. We therefore see no reason to disturb the verdict.

Judgment affirmed.

JACOB FRANTZ, for the use of JOHN GARBERICH, against  
PHILIP BROWN.

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One about to take an assignment of a bond, is bound to enquire into every circumstance that might be set up against payment of any part of the debt, and having failed to do so, he stands exactly in the place of the obligee.

It is competent therefore, for an obligor to set up as a defence to the payment of his bond in the hands of an assignee, a parol agreement between him and the obligee, made after the bond was executed, but before it was assigned, that in a certain event which might and did happen after the assignment, the bond was not to be paid.

In a case where chancery would enjoin an obligee in a bond or his assignee from proceeding at law, while the obligor remains a loser or in jeopardy as a surety, evidence is admissible to enable the jury to produce the same result by means of a conditional verdict.

APPEAL, by the defendant, from the Circuit Court of Lebanon county.

An action of debt on bond was brought by *Jacob Frantz* for the use of *John Garberich*, against *Philip Brown*. The plaintiff gave in evidence the bond of *Philip Brown* to *Jacob Frantz*, for eight hundred dollars, upon which suit was brought, dated the 29th March, 1819, payable on the first of May, 1823, with the equitable assignment thereon, to *John Garberich*, dated fifteenth April, 1820. The defendant then read a notice of the special matter, upon which he intended to rely as a defence, which was in substance this.

That on the 10th of October, 1818, an article of agreement was entered into between *Frantz* and *Brown*, by which *Frantz* sold a tract of land to *Brown*, for two thousand two hundred pounds; seven hundred pounds whereof was to be paid upon the execution of the contract, and three hundred pounds a year thereafter, till the whole should be paid: that bonds were given by *Brown* to *Frantz*, for the said annual payments, upon one of which this suit is brought. That about eight days after the bonds were executed and delivered to

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*Frantz*, he bought a tract of land and mills from *Adam Brechtbill*, for ten thousand six hundred and sixty-six dollars and sixty-seven cents; four thousand two hundred and sixty-six dollars, and sixty-seven cents of which he paid in hand, and agreed to give sixteen bonds, with security, for four hundred dollars each, payable annually, for the residue. That on the 6th April, 1819, *Frantz* called on *Brown* to become his security, in the sixteen bonds to *Brechtbill*, for four hundred dollars each, which *Brown* at first refused to do; but upon its being agreed by *Frantz*, that if *Brown* would sign, as his security, the bonds to *Brechtbill*, the bonds which he, *Brown*, had given to *Frantz* on the 29th March, 1819, for the land purchased, should be his security: that if *Brown* was at any time obliged to pay any of the bonds given by them to *Brechtbill*, that so much should be deducted out of his bonds to *Frantz*, and that *Brown* should not be called upon to pay his bonds to *Frantz*, until *Frantz* had paid his bonds to *Brechtbill*; on these conditions *Brown* signed the bonds, as security of *Frantz* to *Brechtbill*. That *Frantz* became unable to pay his bonds to *Brechtbill*, and that *Brown* was obliged to pay them, and had paid the first eight bonds in full, and the ninth in part. That *Frantz* became insolvent on or before the 10th April, 1821, and that *Brown* will be obliged to pay all the bonds to *Brechtbill*, as they become due.

The defendant having given in evidence, the agreement between *Frantz* and *Brechtbill*, as mentioned in the notice of special matter, and the deed in pursuance thereof, dated 6th April, 1819; offered in evidence three bonds of the same date, *Jacob Frantz* and *Philip Brown*, to *Adam Brechtbill*, for four hundred dollars each, payable on the 1st of May, 1825, 1826 and 1827, together with the parol agreement between *Frantz* and *Brown*, as set out in the notice of special matter.

This was objected to by the plaintiff, who in support of his objection showed, that this suit was brought on the 10th November, 1824. The evidence was rejected by the court.

The defendant then offered in evidence, the prior bonds, *Jacob Frantz* and *Philip Brown*, to *Adam Brechtbill*, four in number; the first payable on the first day of May, 1820, and the last on the first day of May, 1823. Objected to by the plaintiff, inasmuch as these bonds had been credited in a former suit, *Jacob Frantz*, for the use of *Philip Stine*, v. *Philip Brown*; and offered a credit for the amount found by the jury, in said suit, as over paid by the defendant, to wit: two hundred and two dollars and thirty-eight cents—the defendant then agreed that the former trial shall settle the amount over paid on the three first bonds.

The defendant then offered in evidence the bond of *Jacob Frantz* and *Philip Brown*, to *Adam Brechtbill*, payable on the first day of May, 1824, with proof, that it was paid on the day it fell due, or before: objected to by the plaintiff, on the ground, that notice of the assign-

(*Jacob Frantz*, for the use of *John Garberich*, v. *Philip Brown*.)

ment of the bond, upon which the present suit is brought, was brought home to *Philip Brown*, before the bond offered in evidence became due, or was paid; and gave in evidence a suit brought by the plaintiff, against the defendant, in Dauphin county, to recover the amount of the present bond, the 26th day of January, 1824, process served and bail given, and discontinued on the 9th day of November, 1824, the day before this suit was brought. Objections overruled, and evidence admitted; excepted to by the plaintiff.

*John Harrison* was then called by the defendant. I was one of *Jacob Frantz's* assignees; assignee deed, dated the 10th day of April, 1821; sold his goods, January, 1822; I have always understood he was poor; we were not able to pay his debts; I don't know what his circumstances were in 1824.

*Jacob Frantz* was called by the defendant: I did not pay the bond of 1824, which *Brown* and I gave to *Adam Brechtbill*: I was not able to pay it then, nor am I now.

A verdict was rendered for the plaintiff, for three hundred and fifty-one dollars and fifty-eight cents.

The plaintiff prayed the court to grant a new trial for three reasons, the first of which is alone material.

Because the court erred in receiving in evidence the bond of *Jacob Frantz*, and *Philip Brown*, to *Adam Brechtbill*, dated 6th April, 1819, for four hundred dollars, payable 1st May, 1824, and in deciding that the same was a legal defalcation against *John Garberich*, for whose use this suit was brought.

The defendant prayed the court to grant a new trial, and assigned four reasons therefor, all of which amounted to but one.

Because the court rejected the evidence of the payment of the bonds of *Frantz* and *Brown*, to *Brechtbill*, payable 1st May, 1825, 1826, 1827, 1828, and part of the one of 1829, together with parol evidence of the agreement between *Frantz* and *Brown*, at the time they were executed.

The court overruled both the motion of the plaintiff, and of the defendant: and entered judgment upon the verdict, from which decision both parties appealed.

In this court the cause was argued by  
*Montgomery* and *Norris*, for plaintiff  
*Weidman* and *Elder*, for defendant.

For the plaintiff, it was contended, that the court was right in rejecting the evidence of the parol agreement between *Frantz* and *Brown*: a contract cannot rest partly in writing and partly in parol, such evidence was rejected in *Davis v. Barr*, 9 *Serg. & Rawle*, 141. It is against the legal effect of the instrument; and the assignee not having reason to suspect its existence, is not bound to enquire for it from the obligor. An agreement not to enter up a bond, was



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held not to bind, even the original parties. Undoubtedly the assignor could not have released after the assignment, in consideration of this previous liability; and what can not be done directly, cannot be done indirectly. *Andrews v. Becker*, 1 Johns. Cas. 411. *Littlefield v. Story*, 3 Johns. Rep. 425. *Wardell v. Eden*, 2 Johns. Cas. 121. *Raymond v. Squire*, 11 Johns. Rep. 47. *Bates v. N. Y. Ins. Co.* 3 Johns. Cas. 288. Want of notice to the assignee is material; for after that, the interest of the assignor is divested, even as regards the obligor, and all relation between the original parties ceases. Nothing but defalcation or an equity arising out of the concoction of the debt can be urged against an assignee. *Davis v. Barr*, 9 Serg. & Rawle, 141. *Turlin v. Bonson*, 1 Peer Williams, 495. *Cook v. Ambrose*, Addis. Rep. 323. We are purchasers for a valuable consideration, without notice of this germ of incipient equity.

There was error in admitting the evidence of set off of the amount of the bond of 1824, and in charging the jury that they were bound to allow it. *Jenkins v. Brewster*, 14 Mass. 291. *Jones v. Water*, 13 Mass. 305.

The counsel for defendant were requested by the court, to confine their argument to the point on which the defendant appealed.

The evidence of the agreement between Frantz and Brown, should have been received for the purpose of raising an equitable defence, independent of defalcation, 1 Madd. Chan. 154, an assignee takes subject to every equity, *Wheeler v. Hughes*, 1 Dal. 23. *Rundell v. Ettwein*, 2 Yeates 23. *Mann v. Dungan*, 11 Serg. & Rawle, 75. Every defence must be let in; *Solomon v. Kimmel*, 5 Bin. 234. *Bury v. Hartman*, 4 Serg. & Rawle, 175. *Gochenaur v. Cooper*, 8 Serg. & Rawle, 203. *Morrison v. Moreland*, 15 Serg. & Rawle, 61. *Roastet v. The Ins. Co. of North Amer.* 1 Bin. 433. The defalcation act expressly authorises the giving of a bargain in evidence, to show the amount actually and equitably due. Here there is certainly an available equity between the original parties, which is sanctioned by all the authorities, as being also available against the assignee.

The opinion of the court was delivered by

GIBSON, C. J.—Evidence of the agreement between Frantz and Brown, at the time of executing their bonds to Brechbill, was excluded against the bent of the judge's inclination, on the authority of *Davis v. Barr*, 9 Serg. & Rawle, 137, by which he thought his judgment was controlled. It is there stated, that as regards transactions between the original parties, the assignee is to be affected only by defalcation or want of consideration: a construction which is found to be too narrow for the spirit of the act on which the question turns. In that case the agreement did not touch the question of liability; and as the assignee is restrained by the terms of the act, no further than from recovering more than was due at the time of the assignment, it was properly held on principles of

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general equity, that being a purchaser for a valuable consideration, he is protected, by want of notice, from all acts of the original parties that do not affect either the *existence* or the *quantum* of the debt. But it was supposed, that all acts that can affect the *existence*, or the *quantum* of the debt, are necessarily referable to failure of consideration, or set off; the fallacy of which is shown by the present case. The defendant offered to prove that he became surety for *Frantz to Brechibill*, on the faith of an assurance, that whatever he might be compelled to pay in consequence, should be credited on his own bonds to *Frantz*. Here there was something more than a contingent liability at the time of the assignment: so that it is obvious the question turns not on set off, but an equity distinct from it. Set off, itself, was originally nothing more than an equitable defence, which the legislature has thought fit, in plain and simple cases, to subject to the jurisdiction of the courts of common law, reserving to chancery, its original jurisdiction of cross demands, which do not fall within the statute. That such a statute should have been thought necessary here, where the jurisdiction of the courts is compounded of law and equity, is attributable to the unsettled state of the practice at the time. As their equitable jurisdiction is now settled, and universally understood, the courts would be competent to do complete justice, without the statute, as is shown by their having frequently gone beyond it; an instance of which is found in *Childerston v. Hammon*, 9 *Serg. & Rawle*, 68, where the defendants were permitted to defalcate a debt due to one of them, although the terms of the act are applicable only to cases, where a balance may be found in favour of the party pleading the set off, and viewing such a plea as a cross action, it certainly ought not to be maintained, so far as to produce a balance, by two for a debt due but to one. Set off then being out of the question, was there an equity arising from something in addition to a contingent liability, at the time of the assignment? There was an express appropriation of the money to become due on the defendant's bonds to indemnify him from loss, as surety for *Frantz*, which might undoubtedly be set up against *Frantz*, or an assignee having notice of the fact. But the assignee is bound to take notice of every thing, as well a secret trust as want of consideration or set off, which may affect the existence of the debt between the original parties, unless the obligor, after inquiry made, has withheld the requisite information. What would have been the answer to the proper inquiry here? Certainly not, that the bonds were payable at all events, but that the obligee held them subject to an agreement to indemnify the obligor for whatever he should be compelled to pay for the obligee. In *Davis v. Barr*, the agreement being collateral to the existence of the debt, and there being nothing in the enquiry which the assignee was bound to make, to lead the obligor to the subject, the latter might with good faith, have admitted the

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debt, and yet been silent on the subject of the agreement; so that an enquiry about the only thing which the assignee is bound by the terms of the act of assembly to suspect, not being necessarily productive of information, in regard to the fact with which it was attempted to affect him, it was held that for neglecting to make the usual enquiry, he was not to be visited with notice of circumstances, to which it would not have led. Perhaps there will be rarely, if ever, a case to which the principle of that decision will be applicable. In the case at bar, the assignee was bound to enquire into every circumstance that might be set up against payment of any part of the debt, and having failed to do so, he stands exactly in the place of the obligee. As therefore chancery would enjoin *Frantz*, or his assignee, from proceeding at law, while the defendant remains a loser, or in jeopardy as a surety, the evidence is admissible to enable a jury to produce the same result, by means of a conditional verdict.

Judgment reversed, and a new trial awarded.

Roeas J. and Ross J. took no part in the decision, not having heard the argument.

**LEONARD IMMEL**, surviving trustee of **FREDERICK STOEVER**, an insolvent debtor, *against* **JOHN STOEVER**, **CHRISTIAN KREIDER** and **PHILIP STINE**, administrators of **TOBIAS STOEVER**, deceased.

The trustee of an insolvent debtor, cannot sustain an action, in right of the insolvent, without having first given bond.  
A bond executed with security, and filed upon the trial of the cause, is not sufficient.

**APPEAL** from the Circuit Court of Lebanon county, held by Justice **HUSTON**.

It was an action of assumpsit for money had and received. Issues were joined upon the pleas of *non assumpsit* and payment.

It appeared upon the trial of the cause, that *Leonard Immel*, the surviving trustee of *Frederick Stoever*, an insolvent debtor, had not given bond for the faithful discharge of the duties of trustee, before he brought this suit against the administrators of *Tobias Stoever*, deceased. This being made an objection to the plaintiff's recovery, *Leonard Immel* then executed a bond, with sufficient security, in the penalty of twenty thousand dollars, and offered to file the same. The defendant still contended, that the plaintiff could not recover, unless he had given bond before suit brought; and his Honour, who

(Leonard Immel, surviving trustee of Frederick Stoever, an insolvent debtor, v. John Stoever, Christian Kreider and Philip Stine, administrators of Tobias Stoever, deceased.)

tried the cause, being of this opinion, the plaintiff suffered a nonsuit, which he afterwards moved the court to take off, which being refused, he entered an appeal to this court.

*Weidman and Fisher*, for appellant.

The application and discharge of *Frederick Stoever*, as an insolvent debtor, were under the acts of 1730 and 1798, the latter of which was engrafted in the former; when he was discharged on the 6th March, 1809, no security was ordered by the court to be given. The plaintiff has a legal right to recover, without having given security, for the estate passes to the trustee for the benefit of the creditors, immediately upon the execution of the assignment; and if so, the right of action is inseparably incident. *Wilks v. Row*, 3 Yeates, 526. *Cooper v. Henderson*, 6 Bin. 189. *Kennedy v. Ferris*, 5 Serg. & Rawle, 394. *Gray v. Hill*, 10 Serg. & Rawle, 436. The bond is given for the benefit of the creditors, and they may dispense with it: *The Farmers Bank of Reading v. Boyer*, 16 Serg. & Rawle, 48. The debtor can not make the objection, 5 Cranch, 281. 6 Cranch, 329. *Wickersham v. Nicholson*, 14 Serg. & Rawle, 118. The Circuit Court, might from necessity, have taken the security, whereby justice would have been done between the parties, and the creditors of *Stoever*, relieved from all risk.

*Elder and Hopkins*, for the appellees, whom the court declined to hear.

The opinion of the court was delivered by

SMITH, J.—At the trial of this cause, in the Circuit Court of Lebanon county, held in March last, by his Honour Justice HUSTON, the plaintiff was nonsuited, principally on the ground, that he had not entered into the bond, required by the insolvent law of 1798, before he instituted the action; which nonsuit, the plaintiff afterwards moved the court to set aside. That motion being refused, he entered the present appeal. The act of the 4th of April, 1798, (to be found in the 4 vol. *Penn. Laws*, Dall. ed. p. 269,) for the relief of insolvent debtors, formed of itself, a complete system. It provided for the discharge of all insolvent debtors, in term time, and of such as were arrested in execution, in vacation; and directed that every trustee appointed under it, should, before he acted as such, give bond to the commonwealth, with security, in such penalty, as the court should order, &c. It expired on the 1st of May, 1801, but it was revived by an act, passed the 26th of March, 1808, for one year, and from thence to the end of the next session of the general assembly.

*Frederick Stoever*, on the 31st of January, 1809, petitioned the court of Common Pleas of Dauphin county, to extend the benefits of this law to him, and on the 6th of March ensuing, was according-

(Leonard Immel, surviving trustee of Frederick Stoever, an insolvent debtor, v. John Stoever, Christian Kreider, and Philip Stine, administrators of Tobias Kreider, deceased.)

ly discharged by that court, after assigning to the plaintiffs, all his estate, in trust, for the benefit of his creditors. But his trustees did not enter into the bond required by the third section. This suit was instituted to November term, 1823. The question to be decided is, can the action be maintained? It is manifest, from the proceedings of the court of Common Pleas, that they were all founded upon the act of 1798, revived by the act of 1808, and not upon the act of 1730. The legislature then has therein prescribed, that the trustees shall, before they act as such, give bond with security, &c. without complying with that requisition, the plaintiff commenced the present action. It is to no purpose that the insolvent's estate vested in him, as he contends, by the assignment. The law expressly restrains him from doing any act in relation to the trust, until he executes the bond directed to be given; nor can the bond, tendered to the Circuit Court, be regarded as a compliance with the third section of the act of 1798, for the Circuit Court had no authority to determine the amount of the penalty, or approve of the surety in the bond; and even if it possessed such authority, and had received and approved the bond, which was tendered, the plaintiff would not have been aided; since every suit must be good at its inception, nor can the want of a cause of action be supplied by a subsequently accruing right. The act of assembly in question empowers the court of Common Pleas to fix the sum for which the bond should be given, and to approve the security. The plaintiff must look to this law for his guide in the proceedings which he may hereafter adopt, in the execution of his trust. It is only necessary for us at present to say, that we consider the decision of the Circuit Court, from which he has appealed, as perfectly correct, and that the judgment must be affirmed.

Judgment affirmed.

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**JOSEPH GABLE, and others, heirs of CASPAR GABLE, against WILLIAM HAIN.**

When a judgment in ejectment was entered by agreement of the parties, to be released on the payment of a certain sum, on or before a certain day, *time* is of the essence of the contract: and if the money be not paid on or before the day, the judgment becomes absolute and indefeasible. The receipt of the money, by the attorney of the plaintiff, after the day stipulated for payment, without the knowledge of his client, will not prevent the plaintiff from pursuing his judgment to execution, and obtaining the possession of the land.

WRIT of error to the Common Pleas of Berks county.

The facts of this case were these: *Caspar Gable*, the father of the plaintiffs, sold a tract of land to *William Hain*, the defendant

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by articles of agreement: a part of the purchase money was to be paid at a future day, when *Gable* was to convey to *Hain* the land clear of incumbrances. *Gable* died before the deed was made, or purchase money tendered. After his death, his administrators proved the contract, and an order was made by the Common Pleas, granting them permission to make a deed to *Hain*. After the purchase money became due, the deed was tendered to *Hain*, and the money demanded, which was not paid. The present plaintiffs, who are the heirs at law of *Casper Gable*, deceased, then brought this ejectment to compel the payment of the balance of the purchase money.

The cause being ordered on, and the jury sworn, the following agreement was entered into between the parties.

"It is hereby agreed that judgment be entered in the above suit in favour of the plaintiff above named, for the land and tenements in the writ and declaration mentioned, to be released and vacated on the payment of the sum of two hundred and twelve dollars and forty cents, on or before the first day of March next, together with costs of suit, otherwise said judgment to stand in full force and virtue. Witness our hands and seal, this 16th day of January, A. D. 1829."

On the 27th of April, 1829, the two hundred and twelve dollars and forty cents, with interest from the 16th of January, 1829, and all the costs were paid to *Samuel Baird*, Esq. one of the attorneys of the plaintiffs, in the absence, and without the knowledge of his clients.

Previously to the 27th April, 1829, and after the 1st March, 1829, *Gable's* heirs considered the judgment as absolute, and had advertised the land for sale: they did sell the land on the 2d May, 1829, to *John Sohl*. After this, *Leavenworth*, who was also the attorney with *Baird*, for the plaintiffs, issued a *Habere facias possessionem* and *fi. fa.* for costs; upon which the sheriff delivered the possession of the premises to the plaintiffs. On the 8th June, 1829, a rule was granted by the court, to show cause why the *Habere facias possessionem* and *fi. fa.* for costs, should not be set aside; which was subsequently made absolute, and restitution was awarded to the defendant. Whereupon this writ of error was sued out, and the opinion of the court setting aside the *Habere facias possessionem* and *fi. fa.* for costs, and awarding restitution to the defendant, was assigned as error.

*Baird*, for plaintiff in error.—Two questions are involved. 1st. The construction of the agreement as to the materiality of time. 2d. The validity of the acts of counsel, under the circumstances of this case.

The intention of the parties to the agreement seems manifest. Upon the trial of the cause, the defendant had it in his power to

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defeat the recovery of the plaintiff, by the payment of the balance of purchase money due, interest and costs, but which he was either unable or unwilling to do; and the plaintiffs are about to realize their rights by a verdict and judgment, when a compromise *as to time*, takes place, by which it is agreed between the parties, that if the money is not paid *on or before the 1st of March*, the judgment then entered should stand in full force and virtue. There was nothing but time to compromise, and after it elapsed, the title of the plaintiff became absolute. *Hollingsworth v. Fry*, 4 *Dal.* 345. It was a trick upon the counsel of the plaintiffs, practised after the defendant knew that the plaintiffs considered their title as re-vested.

The plaintiffs title, then, having become absolute, their attorney, who was employed only to prosecute their suit to judgment, had no power to part with that title, without his clients express consent. *Huston v. Mitchell*, 14 *Serg. & Rawle*, 307. 7 *Cranch*, 452.

*Deckert*, for defendant in error.—Time, in equity, is not of the essence of a contract. *Amer. Chan. Dig.* 3 *Bibb*, 366. And the object of the action being to compel the payment of the balance of the purchase money, the attorney was *ex officio* authorized to receive it, whereby the terms of the contract were complied with.

The opinion of the court was delivered by

ROGERS, J.—We think it clear, that time was of the essence of the contract; for it would be an unreasonable construction of the agreement, that the defendant should have an indefinite period of time for the payment of the money. To avoid this uncertainty, seems to have been the object of the compromise. The parties themselves, have fixed a reasonable time for payment of the purchase money, which it was the object of the suit to enforce. And this it would have been competent for the jury to do, and is an ordinary operation of a court of chancery, on a bill of foreclosure. In *Hollingsworth v. Fry*, 4 *Dall.* 345, a case not stronger than the present, the time of payment was made a substantial, and not a mere formal circumstance. It was there decided, that when time enters into the essence of a contract, it must be observed. In sales by private agreement, it is usual to fix a time for completing a contract, which at law is deemed of the essence of the contract. But in certain cases equity will carry the agreement into execution, notwithstanding the time appointed be elapsed. But this depends upon the peculiar circumstances of the case, and is never done, when it is contrary to the manifest intention of the contracting parties. When time is made material, it is as binding on a court of equity, as a court of law. If this be the correct construction of the agreement; on the first of March, 1820, *Gable* became re-vested with the absolute title to the land; and a title thus acquired, cannot be divested, except by some act or agreement, on some express authority from the principal. If the plaintiff had accepted the

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money after the stipulated time, it would have amounted to a waiver; not so with respect to its receipt by the attorney, whose power only extended to issuing a *habere facias*, to obtain the fruits of the judgment. Although the power of an attorney at law, is more extensive in Pennsylvania, than in England, yet he cannot, without express authority from his principal, convert his clients money into land, or *vice versa*, as was decided in *Huston v. Mitchell*, 14 Serg. & Rawle, 307. An attorney at law is authorised to do those things, which pertain to the conducting a suit, but has no power to make a compromise, by which land is to be taken, instead of money.

Opinion of the court reversed, and re-restitution awarded to the plaintiffs.



/ SAMUEL HEILNER, for the use of FREYTAG and KAMPMAN,  
against JACOB BAST, JOHN WANNER, and SAMUEL  
FEGELLY.

In the case of an application for the benefit of the insolvent laws, the decree of the court, "Proceedings quashed by order of the court," is conclusive evidence, that the applicant did not comply with the terms of his bond; and the cause of such order cannot be inquired into collaterally.

It is the duty of the applicant to surrender *himself* to prison, if he fails to comply with all things required by law to entitle him to be discharged.

*Quere.* Whether the court has power to recommit the applicant, except he had been guilty of fraud.

After an insolvent bond is forfeited, the issuing of an *Ala. Ca. Sa.* by the same plaintiff, upon which the insolvent gave another bond, and was subsequently discharged by law, is not a waiver of his right of action upon the first bond.

WRIT of error to the Common Pleas of Berks county.

This was an action of debt upon an insolvent bond, brought by Samuel Heilner, for the use of Freytag and Kampman, against Jacob Bast, John Wanner, and Samuel Fegelly.

The bond, dated 1st July, 1825, was in the penalty of two thousand dollars, with the following condition annexed. "Whereas the above bounden Jacob Bast, hath been arrested, and is now in arrest, at the suit of the said Samuel Heilner, for the use of Freytag and Kampman, for the sum of one thousand and three dollars and fifty-seven cents, besides costs; and the said Jacob Bast, having made application to the honourable Jacob Schneider, one of the judges of the court of Common Pleas of the county of Berks, to be released from such confinement, on his entering into bond with sufficient security, to comply with the provisions of the act of the general



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assembly of the commonwealth of Pennsylvania, passed the twenty-ninth day of January, A. D. 1820, entitled "A supplement to the act entitled, an act for the relief of insolvent debtors," and the said Jacob Schneider having approved of the above named John Wanner, and Samuel Fegelly, security for the said Jacob Bast.

"Now the condition of the above obligation is such: that if the said Jacob Bast, shall appear before the honourable the Judges of the court of Common Pleas for the county of Berks, at the next term of said court, to be holden on the first Monday of August, A. D. 1825, and then and there remain, and abide the final order of the said court, to be made during the said term, and then and there surrender himself to prison, in case (on his appearance before the said court,) he shall not comply with all things required by law, to procure his discharge from confinement: then the above obligation to be void, otherwise to remain in full force and virtue."

After the plaintiff had given in evidence this bond and rested: the defendants gave in evidence the *capias ad satisfaciendum*, at the suit of the said Samuel Heilner, for the use of Freytag and Kampman, v. Jacob Bast, upon which the defendant had been taken, and had given this bond, and the sheriff's return thereon "discharged on giving bond." They then showed the petition of Jacob Bast, regularly presented at the next term, according to the condition of his bond, the order of the court thereupon, appointing a day for hearing the petitioner and his creditors; the notice to creditors published according to the order of the court, and exhibited the record of the court, showing that the said Jacob Bast, together with ten others, who were to appear at the same time, had regularly appeared on the day, and at the time fixed, when the court, for reasons which did not appear upon the record, made the following order, "the proceedings quashed by order of the court." The defendants further gave evidence that afterwards, to wit, to January term, 1826, an *alias capias, ad satisfaciendum*, issued at the suit of the same plaintiffs against the same defendant, upon which the sheriff returned "*Tarde venit*:" That a *pluries capias*, issued to the next term upon which the said Jacob Bast was taken, and gave another insolvent bond with John Wanner, as his security: that in discharge of this bond, Jacob Bast appeared at the next court, filed his petition, and was afterwards regularly discharged, under the insolvent laws, on the 8th August, 1826.

To all which evidence the plaintiffs demurred, and the defendants joined in the demurrer.

The court of Common Pleas gave judgment for the defendants. Smith, for plaintiffs in error.

The questions presented are: Is the bond upon which the suit is brought, so formal, as that the plaintiffs may recover upon it; have its conditions been complied with; and if not; have the plain-

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tiffs done any thing which amounts to a waiver of their right to recover.

It has already been decided, that this bond is a substantial compliance with the act of assembly, and valid. *The Farmers Bank of Reading, v. Boyer*, 16 *Serg. & Rawle*, 48. The petitioner did not comply with all things necessary to procure his discharge, for the proceedings were quashed by a decree of the court, and that decree is conclusive, and cannot be controverted. *Sheets v. Hawk, et al.* 14 *Serg. & Rawle*, 173. *Lester v. Thompson*, 1 *Johns.* 300. *Leese v. Asper*, M. S. S. decided at Chambersburg, 1828. It is not necessary that there should be an order of the court for the delivery of the insolvent into prison; act of 1820. *Ingraham on insol.* 14-15. The issuing of the *alias* and *pluries ca. sa.* operated for the benefit of the sureties, and they cannot complain of it, *Ingraham on insol.* 29. *Sharp v. Speckenagle*, 3 *Serg. & Rawle*, 463. At all events the second proceeding by the plaintiffs, was the obtaining of an additional security, and the circumstance of one of the same sureties going into the second bond, the plaintiffs had no controul over; nor does it alter the nature of the case.

*Deckert and Biddle*, for defendants in error.

This insolvent with all the others at that term, were refused their discharge, exclusively on the ground that their bonds were defective; and the present plaintiffs acquiesced in this opinion for two years before they brought suit. This is an ungracious claim. The insolvent has substantially complied with the condition of the bond, by appearing and submitting to the order of the court, who quashed all the proceedings, including the bond. If the court erred, that error should not now be visited upon the heads of innocent bail; particularly, as the insolvent was within a reasonable time thereafter discharged upon another petition, when arrested at the suit of the same plaintiffs. If the second bond was an additional security, it was discharged and satisfied by the final discharge of the insolvent, and any one of the securities being discharged, was a discharge of all.

*Baird* in reply. This is a demurrer to evidence which is upon the record, and upon that alone this court must decide. Why the insolvent was not discharged, does not appear; nor could it appear, if it had been offered in evidence. The court had no power to quash the bond; to destroy a subsisting contract between the insolvent and his creditors. The only question then is, did the subsequently issuing the *alias* and *pluries ca. sa.* waive the first bond. There is no express waiver, and certainly it cannot be so by construction; for the bail were not prejudiced by it. The pursuit of the original debtor by due process of law, can never exonerate his bail.

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The opinion of the court was delivered by

ROGERS, J.—*Jacob Bast*, being in the actual custody of the sheriff of Berks county, gave bond to the plaintiffs, at whose suit he was arrested, with the sureties required, and regularly approved of by a judge at his chamber, whereupon, in compliance with the act of the 28th March, 1820, he was discharged from arrest. The bond, which is in accordance with the act, 16 *Serg. & Rawle*, 48. *Farmers Bank of Reading v. Boyer*, has the following condition under written, that *Jacob Bast* will appear, &c. before the court of Common Pleas of Berks county, at the next term, &c. and then and there surrender himself to prison, in case, on his appearance, he shall not comply with all things required by law, to procure his discharge. *Bast* filed his petition in due form, and in the other preparatory steps complied with the directions of the act, and the court appointed a time for hearing him and his creditors, but for a reason, which is not stated, and if it were, would be immaterial, they refused to discharge him, and made the following entry, "Proceedings quashed by order of the court." From this entry, which is the only one on the record, it appears that *Bast* failed to comply with all things required by law to procure his discharge. Being the decree of a court of competent jurisdiction, it is immaterial what may have induced the decision, for if, as was ruled, in *Sheets v. Hawk, et. al.* 14 *Serg. & Rawle*, 173, the record of the discharge of an insolvent debtor is conclusive, as to the fact of having complied with all things required by law to entitle him to his discharge, then the refusal to discharge him must be equally conclusive, and not the subject of enquiry in a collateral suit. The record conclusively shows that *Bast* was not discharged, and is evidence which cannot be controverted, that a substantial condition of the bond has not been complied with. The entry, "Proceedings quashed by order of the court," was tantamount to a decree that he had failed to comply with some of the essential requisitions of the statute, and whether the opinion of the court was right or wrong, is not open to enquiry. On the refusal of the court to discharge the petitioner, it was his duty to surrender himself to prison in discharge of his bail, and this without any order of the court for that purpose. It is the express condition of the bond, that he will surrender *himself*, in case he shall not comply with all things required by law to procure his discharge. Indeed, it may admit of doubt, whether the court would have power to recommit the prisoner, except he had been guilty of fraud. After the rejection of his application for the benefit of the act, he had one of two courses to pursue, either to surrender himself to prison, or forfeit his bond. This was a matter for himself to determine, but a case may be readily supposed where the petitioner would rather submit to

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the latter alternative. It has been contended that by the entry, "Proceedings quashed, by order of the court," the bond was vacated. We cannot suppose this to have been the intention of the court, as they would clearly have no such power; and if they had expressly vacated the bond, such an order would have been a mere nullity, and treated as such in a suit to recover on it. The bond is directed by the act to be given to the plaintiff, at whose suit he is arrested, and for his benefit, so that I cannot believe that the court would have greater power than in the case of an ordinary bond, or any other instrument of writing whatever. The common law does not recognize such summary proceedings, which would deprive the plaintiff of his remedy of trial by jury, and the opportunity of review in the supreme court. But it has been contended, that the *alias ca. sa.* and the subsequent discharge waives any right of action which he might otherwise have on the bond. This argument is rather specious than solid, for the *alias* is not in prejudice, but for the benefit of the bail. It is obviously to their advantage to pursue the principal, and compel him to assign his property for the benefit of his creditors.

Judgment reversed, and a *venire de novo* awarded.

[Appeal by HENRY BETZ, JOSEPH HIESTER, LEWIS REES, and MICHAEL RAEFSNYDER, ISAAC M. YOUNG, and JACOB FRITZ.

The issuing of a *ferri facias* within a year and a day, and a levy upon personal property, subject to former levies, or on personal property as per inventory annexed, or a return of *nulla bona*, does not keep alive the lien of a judgment beyond five years, from the return day of the term to which it is entered.

Upon a transcript of the judgment of a justice of the peace, entered as a lien upon land, the five years within which a *scire facias* shall issue, to preserve the lien, must be computed from the first day of the term to which it is entered, and not from the actual date of the entry.

This case came up by appeal from the decree of the court of Common Pleas of Berks county, distributing the proceeds of the sale by the sheriff, of the real estate of *Samuel Krauser, Adam Krauser, and Daniel Krauser.*

The real estate was sold on the 2nd November, 1829, and the sum of two thousand five hundred and ninety-seven dollars and thirty-seven cents, being brought into court for distribution, the matter was referred, by consent, to three commissioners, who made

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a report to the court, allowing the following judgments, the circumstances of which, gave rise to the points which are settled by this court.

Jacob K. Boyer, for the use of	} Of August term, 1821, No. 47.
Henry Betz,	
v.	
John Krauser & Samuel Krauser.	Judgment entered, 18th Sep- tember, 1821. Real debt, \$280 31.

*Fi. Fa.* to August term, 1822, returned "Levied on personal property subject to prior executions." *Vend. expos.* to January, 1823, returned "unsold." *Fi. fa. post. vend. expos.* to April term, 1827, returned "*Tarde venit.*" April 14th, 1827, rule to show cause why the execution should not be set aside, and defendants let into a defence, May 18, 1827; rule made absolute, judgment to remain as security. *Scire facias* to August term, 1827, and 1st June, 1829, judgment by report of arbitrators, for four hundred and twenty-nine dollars and fourteen cents.

Same plaintiffs.	} Of April term, 1822, No. 89. Judgment enter- ed, 8th February, 1822. Real debt \$153.33.
v.	
Same defendants.	

Alike proceedings were had upon this judgment as the first; the same returns were made thereto; the same rule entered; *scire facias* issued the same time, and on the 1st June, 1829, judgment by report of arbitrators, for two hundred and thirty-six dollars and eleven cents. To the allowance of these two judgments by the commissioners, the following exceptions were filed in the Common Pleas, by Jacob Hawk, a subsequent judgment creditor.

1st. That the executions issued upon the said judgments were levied upon personal property, sufficient to satisfy the same.

2nd. Because said judgments were not revived agreeably to the act of assembly, or the lien continued beyond five years, from the first return day of August term, 1821, under the then existing laws.

The court of Common Pleas overruled the first exception, and sustained the second, from which Henry Betz, appealed.

Mills and Reese,	} Of January term, 1823, No. 10. Tran- script of a judgment from the docket of a justice, for \$66 48.
v.	
John and Samuel Krauser.	

Entered, 11th January, 1823.

*Scire facias* issued 7th January, 1828, to April term, 1828, upon which judgment was entered.

There was another transcript of a judgment at the suit of the same plaintiffs, against the same defendants, entered at the same time, and depending upon the same circumstances. To the allow-  
ance of these two judgments, Jacob Hawk, also filed an exception.

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That the said judgments were not liens on the real estate sold, they not having been revived within five years from the first return day of January term, 1823, agreeably to the act of assembly.

The 6th January, was the return day of January term, 1823.

This exception was sustained by the court of Common Pleas, and Lewis Rees, appealed.

Joseph Hiester, Esq.

v.

Adam, Samuel, and John Krauser.

} Of November term, 1823, No.  
112. Judgment entered, 10th  
Nov. 1823, for \$400.

*Fi. fa.* to January term, 1824, returned "levied on personal property, as per inventory annexed." *Vend. expos.* to April term, 1824, returned "stayed by plaintiff." *Als. vend. expos.* to August term, 1824, returned "property sold to the amount of sixty-nine dollars and thirty-nine cents," and this amount has been deducted from the interest and costs in the above case. *Scire facias* issued to January term, 1829. Exception was also filed by Jacob Hawk, to the allowance of this judgment.

That the same had not been revived by *scire facias* within five years from the return day of the term to which it was entered.

This exception was also sustained by the court of Common Pleas, and Joseph Hiester, Esq. appealed.

Michael Raefsnider, Isaac M.

Young, and Jacob Fritz,

v.

Samuel, John and Adam  
Krauser.

} Of January term, 1824, No. 10.  
Judgment entered, 12 January,  
1824, for \$367 73.

*Fi. fa.* to November term, 1824, returned "*nulla bona*."

Jacob Hawk,

v.

Samuel, John & Adam Krauser.

} Of January term, 1824, No. 11.  
Judgment entered, 12th Janua-  
ry, 1824, for \$1560.

*Fi. fa.* to January term, 1824, levied on real estate, inquisition held, and the same condemned. *Scire facias* to January term, 1829, and judgment thereon.

The commissioners reported that a balance of five hundred and ninety-one dollars and eighty-five cents, which remained after the payment of prior liens, should be divided rateably between these two judgments.

To which Jacob Hawk excepted. That his judgment should be paid before any money should be appropriated to the judgment of Raefsnider, Young and Fritz, which had lost its lien.

This exception was sustained by the court of Common Pleas, and Raefsnider, Young and Fritz, appealed.

In this court, the appellants assigned as error, the opinion of the court in the several foregoing decrees.

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*Baird*, for appellants.

There are two questions which arise out of this case. First, whether the issuing of a *fi. fa.* within a year after the entry of the judgment will keep alive its lien beyond the period of five years.

And second. Whether upon a transcript of a judgment from the docket of a justice, the five years shall be computed from the *first day of the term* to which the judgment was entered, or from the actual date of its entry upon the docket.

The affirmance of the opinion of the court below, on the first point, will establish a doctrine differing from the received opinion of the bar, and uniform practice of all the courts in Pennsylvania, and which grew out of the judicial decisions of our own courts. The question first came before the court, in the case of *Young v. Taylor*, 2 Bin. 218, where it was ably argued, and received the deliberate consideration of the court, and where it was held, that the issuing of a *fi. fa.* would keep alive the lien of a judgment. The next case is that of *Lewis v. Smith*, 2 Serg. & Rawle, 142, where the same doctrine is held, and predicated upon the construction, which practice had given to the statute of Westminster the 2nd, and our own statute of the 4th April, 1798. In the case of *Pennock v. Hart*, 8 Serg. & Rawle, 369, *Young v. Taylor*, is approved; and in *Pennock v. McKisson*, 13 Serg. & Rawle, 144, the whole scope of the argument of *Duncan Justice*, recognizes the cases of *Young v. Taylor*, and *Pennock v. Hart*, as being sound law. The *quere* which is put in the case of *Pennock v. McKisson*, is the *quere* of the reporters, and not authorized by the case itself: in the argument of that case, by Mr. Hepburn, who is a member of the bar of great experience and learning, and whose opinion in matters of practice will have weight, this position which we contend for is admitted. The case now at bar is a strong illustration of what we considered the settled law to be. In the act of the 26th March, 1827, *Pam. laws*, 129, we have the understanding of the legislature of what the practice was, for therein they provide that a *scire facias* shall issue, *notwithstanding an execution had issued*. If then, on this subject, the understanding and practice has been uniform and extensive, the evils of a different construction would be innumerable; this result the court will not produce, unless the evils of the present system are correspondingly great.

When the act of 1798 was passed, the legislature had in view the practice of entering judgments upon warrants of attorney, and did not contemplate the case of transcripts, which at the passage of that law, there was no authority to enter on the county docket. But the 20th section of the act of 20th March, 1810, *Purd. Dig.*, 454, which authorizes the entry of a transcript, provides that from *the time* of such entry, it shall bind the real estate of the defendant

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*H. W. Smith*, for the appellee.

Prior to the act of 4th April, 1798, judgments were a lien on real estate for an indefinite period; by that act it ceases to be a lien, unless revived by *scire facias*, within five years from the return day of the term to which it is entered. This act is as clear and comprehensive as it is positive in its terms: it was evidently intended for the benefit of purchasers, and subsequent lien creditors. The *scire facias*, *post annum et diem*, is given by the statute of Westminster 2nd, and is intended for the benefit of the defendant in the judgment, that he may have an opportunity of showing that the debts paid, since the rendition of the judgment; so that there is no analogy between the two acts—the decisions that have taken place under the one, cannot be applied to the other.

The point now before the court, did not arise in the case of *Young v. Taylor*, there, there was no levy on personal property, the levy was on the two lots against which the lien was sought to be enforced, but further proceedings were directed to bring the matter before the court. So far as this point was noticed, was only by a dictum of Judge Yeates, which was not called for, and which, as is said by senator Platt; in 9 *Johns. Rep.* 415; and *Huston, J.* in 17 *Serg. & Rawle*, 292; and *Gibson, C. J.* in 7 *Serg. & Rawle*, 78, is always uncertain authority for what the law is. There is a dictum of Judge Duncan, in 9 *Serg. & Rawle*, 311, that the mortgagee has the right to the actual possession of the land, one year after the last day of payment; but when the point came directly before the court, in 12 *Serg. & Rawle*, 240, it was decided that the mortgagee was entitled to recover before all the payments were due. But since the case of *Young v. Taylor*, this court decided that so far as respects third persons, a levy on personal property discharges the lien of the judgment to the value of the property levied. *Hunt v. Breeding*, 12 *Serg. & Rawle*, 37. *Dean v. Patton*, 13 *Serg. & Rawle*, 341. *Duncan v. Harris*, 17 *Serg. & Rawle*, 436. *United States v. Stewart*, M. S. case, Pittsburg, September, 1828. In *Lewis v. Smith*, the levy was on personal property, there was no question of lien as to land. If an execution be issued within a year and a day, an *alias* may issue at any time afterwards, without a *scire facias*, to obtain satisfaction of the debt, but not to continue the lien of the judgment: the existence of the debt and its lien are not inseparable; the lien may be waived, and the debt still continue. *The Bank of Pennsylvania v. Winger*, 1 *Rawle*, 295.

The case of *Pennock v. Hart*, has been much shaken in its authority, even by the present Chief Justice, who delivered that opinion of the court, for he has said that he is less confident of the soundness of that decision, than when it was pronounced, and in the *Commonwealth v. Conard*, 1 *Rawle*, 253, Justice Smith, says,



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"indeed very few lawyers foresaw, or expected the decision of *Pennock v. Hart*." It is restricted in its application, in *Black v. Dobson*, 11 *Serg. & Rawle*, 94; and in *Bombay v. Boyer*, 14 *Serg. & Rawle*, 253. In the *Commonwealth v. McKisson*, the lien is confined to the particular lands levied on; and there the court seemed reluctant to go even that far. *Chahoon v. Hollenback*, 16 *Serg. & Rawle*, 425, is the last case on the subject, and where *Huston, J.* reviews all the prior cases, and decides against the lien now asked for.

The object of an execution is satisfaction of the debt, not security for it; and whenever an execution creates a lien, it is on the property specifically levied, which is necessary to render the process effectual, until satisfaction is obtained. A levy on a particular tract of land, is notice that the creditor has resorted to it for payment, and a lien is the consequence until it is obtained; but a levy on personal property, or a return of *nulla bona*, can give no such notice: the former may induce third persons to believe that the judgment creditor has resorted to the personal property, and received satisfaction; and the latter is but notice, that no satisfaction was obtained, which sufficiently appears by the unsatisfied judgment on the docket. *Mills* and *Rees's* judgments, although transcripts from the docket of a justice are entered for the purpose of lien on the real estate, and are necessarily liable to all the legal consequences incident to the lien of a judgment under the act of 4th April, 1798.

The opinion of the court was delivered by

SMITH, J.—(His Honour stated fully the facts of the case.) The questions, which are to be decided here are. 1 Whether the lien of a judgment, is continued beyond five years, from the first return day of the term of which it is entered without a *scire facias* to revive the same, by a *fieri facias* issued within a year and a day, and returned, levied on personal property, subject to prior executions, or, levied on personal property, as per inventory annexed, or returned, "*nulla bona*;" and 2ndly. Whether the transcript of a judgment of a justice of the peace, filed in the court of Common Pleas, continues the lien five years from the day on which it was actually entered, or five years from the first return day of the term of which it is entered, according to the provisions of the act of the 4th of April, 1798. With regard to this last question, we find it impossible to draw a distinction between a judgment entered by confession, or on verdict, and a judgment entered from a transcript of a justice. It was long ago decided, that judgments obtained before justices of the peace, when filed in the prothonotary's office, are on the same footing with judgments in court. *Scott v. Ramsey*, 1 *Bin.* 221. The words of the act of 1798, section 2, are, that "no judgment hereafter entered in any court of record within

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this commonwealth, shall continue a lien on the real estate of the person against whom such judgment may be entered, during a longer term than five years from the first return day of the term of which such judgment may be so entered, unless the person who may obtain such judgment, or his legal representatives, or other persons interested, shall, within the said term of five years, sue out a writ of *scire facias*, to revive the same." We have no doubt that the case of a transcript, is embraced both by the language and spirit of this provision, and we are unanimously of opinion, that the court below was correct in sustaining the exception to the allowance of *Rees and Mills'* judgments, as existing liens, five years from the first return day of the January term, 1823, having expired, when the *scire facias* was issued upon them respectively, though only by a single day. The other question does not admit of so easy a solution, nor are the members of this court unanimous respecting it. I may, however, state that four of us, concur in the opinion, that where the *feri facias* is returned "*nulla bona*," the lien is not thereby continued on the land; and that a majority of the court consider that the lien is not continued by a *feri facias*, returned levied on personal property, as per inventory annexed.

The act of 1798, limiting the time during which a judgment shall be a lien on real estate, &c. is imperative in its injunction, that no judgment shall continue a lien, unless a writ of *scire facias* be sued out within the time therein prescribed, to revive the same. It is true, that this excepting clause, has been extended by construction to the case of a *feri facias* levied on lands, and also, to the case of a *cesset executio*, making the five years during which the *scire facias* may be issued, to commence at the expiration of the stay. There is no disposition in this court, to carry the construction beyond the decisions in the cases of *Young v. Taylor*, 2 Bin. 218. *Pennock v. McKisson*, 13 Serg. & Rawle, 144; and *Pennock v. Hart*, 8 Serg. & Rawle, 319. In the last mentioned case, the stay of execution was entered upon the record, and this entry has been decided, in subsequent cases to be essential to the extension of the period within which the plaintiff may issue a *scire facias* to revive his lien. Every effort to induce us to carry the construction beyond that point, has proved unavailing, and we have held, that no agreement between the parties for a stay, will be valid, as to third persons, unless it be placed upon the record at the time of entering the judgment. *Black v. Dobson*, 11 Serg. & Rawle, 94. *Bombay v. Boyer*, 14 Serg. & Rawle, 253.

In *Young v. Taylor*, the *feri facias* was levied on goods and land; the very land in controversy, on which was held an inquisition, that condemned it. The *feri facias* thus levied, with the inquisition and condemnation, was considered, in point of notice of the creditors pretensions, to be equivalent to the *scire facias* mentioned in the

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act of the 4th of April, 1798, and to supersede that writ. Even the letter of this case affords no support to the errors assigned by the appellants, whose writs of *feri facias*, were levied on personal property alone; and if we regard its spirit and reason, which constitute the real authority of every precedent, we shall be satisfied that it cannot contribute in the least to sustain these appeals. The act of assembly in question, was passed for the safety of purchasers of real estate. The *scire facias* within five years was intended as notice, that the judgment creditor still looked to the land as security for his debt. His omission to sue it out affected him in no other way, than by relieving the land from the lien of his judgment. The purchaser, where a *scire facias* has been duly sued out, is fully notified of the incumbrance, and of the creditor's intention to regard the land as the fund out of which he expects to be paid. Buying with notice, he cannot complain. "But," said Judge Yeates, in 2 Bin. 229, "It will not be denied, that the plaintiff taking out a *feri facias*, levying on goods and lands of the defendant, and condemning the lands by an inquest, are matters of notoriety, and in point of notice of the creditor's pretensions, tantamount to a *scire facias*. Such I take it, has been the construction of this section of the act." It was the notoriety of these proceedings upon the judgment affecting the lands, that was thought to supply the purpose of the *scire facias*, in giving notice of the plaintiff's intention *not* to relinquish his lien upon them. But how can we infer such an intention from a *feri facias*, levied upon personal property only? In *Hunt v. Breeding*, 12 Serg. & Rawle, 37, it was decided, that a judgment creditor, who has seized the goods of his debtor in execution, cannot discharge them, and leave his judgment in force as to the land. See also, *Dean v. Patton*, 13 Serg. & Rawle, 341, and *Duncan v. Harris*, 17 Serg. & Rawle, 436. A levy on personal property, cannot be considered as notice to a purchaser, that the creditor means to rely on his lien upon the debtor's lands. It is an indication of a different intention. The *feri facias* itself is no lien upon the land, until it is seized in execution by virtue of the writ. It is a lien upon the defendant's goods from the time of its delivery to the sheriff, and where goods of sufficient value are actually seized in execution, the debt is extinguished, and the judgment satisfied. In the fact of levying on personal property, what is there, of actual notoriety, calculated to supply the notice by *scire facias* of the creditors purpose to renew or revive his lien upon the defendant's land? Certainly nothing. If then, we go to the record, we find an entry of a *feri facias* issued, and returned, "levied on personal property." Is there any thing in this, that really intimates the creditor's design to maintain his lien upon the land? On the contrary, the entry shows that the creditor has resorted to the defendant's goods, for the satisfaction of his debt; and the

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legal consequence is, that he is not at liberty to give them up, and proceed against the land. In the case of *Pennock v. McKim*, 13 Serg. & Rawle, 144, the decision, was, "barely on the effect of a levy on particular lands, preserving the lien on the land levied," without a *scire facias* to revive; and it was decided on the authority of *Young v. Taylor*, that it was sufficient for that purpose; though, Judge Duncan, who delivered the opinion of the court, declared, that if the matter were *res integra*, he would have given a different decision.

Upon the present question, I consider this court, as untrammelled by former decisions. We have the plain and unequivocal enactment of the legislature for our guide, without any reason to suppose, that if they had foreseen the case now under consideration, they would have employed one word more or less, in order to bring it within the exception to their limitation. There is no instance in which a *feri facias* levied merely upon personal property, has been held to be within that exception; nor can the decisions or practice under the statute of Westminster 2d, in my opinion, warrant such a construction, in relation to a *feri facias* thus executed. The object and character of that statute, and of our act of the 4th of April, 1798, are indeed so different, that I am at a loss to discover the propriety of reasoning from one to the other.

In fine, we think, that as *no scire facias* was sued out, according to the second section of the act of the fourth of April, 1798, to revive the judgments of *Jacob K. Boyer*, for the use of *Henry Betz*, and the judgment of *Joseph Hiester*, Esquire, within five years from the first return day of the term, of which they were respectively entered, they did not continue a lien on the real estate of the defendants therein named beyond that period, notwithstanding the *feri facias* issued upon them, and levied on the personal property of these defendants. The appellee, *Jacob Hawk* had issued a writ of *scire facias*, to continue his lien, so that in fact, the case was between those who had complied with the law, and those who had disregarded it.

GIBSON, C. J.—No man is more ready than I, to admit the fallacy of the construction in *Young v. Taylor*, but as it has laid the foundation of a practice extensively adopted, I think that the germ of much evil is discernible in the present departure from it. The importance of that case is not derived from the point directly decided, but from the breadth of a principle asserted in it, that "no change was intended in the mode of keeping judgments alive, by issuing an execution within the year and day, superseding the necessity of issuing a *scire facias* under the statute of Westminster the second." Since that statute, the judgment was kept alive by the issuing and continuance of an execution, without regard to the

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circumstances of a levy, which was considered to be immaterial; and I feel confident that on the authority of this *dictum*, the same practice has prevailed in many parts of the state, as uninterruptedly since the act of assembly, as it did before. To follow it to the point at which it has been arrested by the legislature, would produce no material inconvenience; for although little accordant with the letter or spirit of the act, I am not aware that it has ever produced injustice: what the consequences of overturning it may be retrospectively, no man can foresee. Purchasers have reposed on it for twenty years; and to deprive them of a title founded in a practice repeatedly recognized by judicial decision, ought to require the presence of an overruling mischief, which, it seems to me, does not exist. I am, therefore, averse to any change, particularly in what seems to me to have become a rule of property; and I am happy to say my brother ROGERS, is of the same opinion.

The judgment and decrees of the court of Common Pleas, are affirmed.

ROGERS, J.—Concurred with the Chief Justice.

**HENRY BETZ, assignee of WILLIAM GREEN, against  
GEORGE HEEBNER.**

An assignee of bonds, which are secured by a mortgage, is entitled to all the security which the mortgage affords, although he did not know of its existence when he took an assignment of the bonds.

An assignment of the mortgage deed, to one who holds part of the bonds, gives him no preference over the other bond holders, in the distribution of the proceeds of sale of the mortgaged premises.

ERROR to the Common Pleas of Schuylkill county.

This case came before the court of Common Pleas on, a rule to appropriate the proceeds of the sale by the sheriff, of the real estate of *George Heebner*.

The following facts were agreed to as a special verdict.

*George Heebner*, the defendant, on the 12th April, 1814, executed a mortgage on 150 acres of land to secure the payment of nine bonds, given at the same time, to *William Green*, and which fell due on the 1st of April, in each year thereafter. The two first bonds were paid when they fell due. On the 6th of September, 1816, the three next bonds were assigned by *Green* to *Daniel Groeff*, and the payment thereof was guaranteed by the said *Green*: these bonds were afterwards, on the 9th September, 1816, assigned to

• (Henry Betz, assignee of William Green, v. George Heebner.)

George Heisler, by Groeff, who also guaranteed the payment thereof: one of these three was afterwards assigned by Heisler to John Stroh, who brought a suit thereon, obtained judgment, issued a *fiery facias*, which was levied on personal property, and issued a *vend. expos.* upon which the sheriff returned "sold and proceeds applied to prior executions." The other two of the three last mentioned bonds, were assigned by Heisler to the Farmers Bank of Reading, who brought suit thereon, obtained judgment, issued *fiery facias*, and levied on the mortgaged premises. On the 27th July, 1818, the mortgage deed was first put on record. On the 3d September, 1818, the mortgage deed, together with the four last bonds, were assigned by Green to Henry Betz, the plaintiff, who issued a *scire facias* upon the mortgage, obtained judgment, issued *levary facias*, upon which the mortgaged premises were sold for eight hundred dollars, and the money paid into court for appropriation. The question for the opinion of the court was, whether Henry Betz, the assignee of the mortgage, was entitled to the whole amount of the proceeds of the sale, in discharge of his four bonds; or whether each holder of a bond was entitled to a *pro rata* dividend thereof.

The opinion of the court below was, that the mortgage was a security for all the bonds, and that the proceeds of sale should be distributed *pro rata* among the holders.

This opinion was here assigned as error.

Bannan and Biddle, for plaintiff in error.

This case differs from the case of *Donnelly v. Hayes*, 17 Serg. & Rawle, 400, in this, that at the time Betz took the assignment of the mortgage and bonds, he had no notice that the first bonds were unpaid, and in the hands of assignees. The assignees of the first bonds knew nothing of the mortgage when they took their assignments, for it was not on record at the time: Betz has therefore greater equity, and a superior legal right, in having an assignment of the mortgage itself. *Wells v. Archer*, 10 Serg. & Rawle, 412. When Green assigned the first bonds, there was no lien on the land, and he had a right to make what bargain he pleased with the assignees, and having reserved to himself the mortgage, for the security of the last bonds alone, this agreement will have the effect which the parties designed it should have.

Smith, for defendant in error, whom the court declined to hear.

Judgment affirmed.

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**MICHAEL BOWMAN**, against the executors of **HENRY HERR**, deceased.

Previously to the settlement of an account in the Orphans Court, an action of *assumpsit* will not lie by the ward against his guardian, to compel such settlement and payment of the balance.

The Orphans Court has full power and authority to settle the account of a guardian, and if a balance is found to be in his hands, when the ward arrives at full age, to compel the payment of it, by attachment or sequestration of the goods or lands of the accountant.

A settlement made by the guardian once in every three years, in pursuance of the 3d section of the act of the 31st March, 1821, is not conclusive upon the ward, but may be impeached upon the final settlement of the account when the ward arrives at full age.

Upon the death of a guardian before the settlement of his account, his representatives may be cited and compelled to settle it; and the Orphans Court may exercise the same power to compel them to pay over the balance as they would against the guardian himself.

**APPEAL** by the plaintiff from the decision of **HUSTON, J.** at a Circuit court held in Lebanon county.

*Henry Herr*, the defendant's testator, had been the guardian of *Michael Bowman*, the plaintiff, and died without having settled a guardianship account of the estate of his ward which had come to his hands.

The plaintiff *Michael Bowman*, after he arrived at full age, brought this suit against the representatives of *Henry Herr*, his late guardian, and claimed to recover upon a declaration for money had and received for his use.

Upon the trial of the cause, the plaintiff offered evidence of the receipt of money by the defendant's testator, as the guardian of the plaintiff: to which the defendant objected, on the ground that the plaintiff could not support his action, without showing that previously to the institution of it, the guardian or his representatives had settled a guardianship account in the Orphans court. This objection having been sustained by the court, the plaintiff took a nonsuit, which he afterwards moved the court to take off, and which being refused, he entered this appeal.

In this court the cause was argued by  
*Elder and Hopkins*, for plaintiff appellant.  
*Kline and Weidman*, for appellees.

The opinion of the court was delivered by

**ROGERS, J.**—At the common law a guardian is liable to an action of account render, but there is no instance of an action for money had and received, having been sustained against him, before settlement of his account. The remedy by account render, is but seldom resorted to, but the practice is for the ward to file a bill in chancery, calling the guardian to account. The Equity Courts take jurisdiction on the ground of their general superintendence of all infants, and because the guardian is a trustee; and it is the peculiar duty

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of chancery to ensure the faithful discharge of a trust. This course has many advantages, as the guardian may be examined on oath, and is compellable to produce books and papers, and other written documents, that may lead to a thorough investigation of the case, and a just decision of the controversy. *Co. Lit.* 89. 1 *Blac. Com.* 463. *Bac. Ab.* Title guardian and ward. The same results may be obtained in the action of *account render*, although in a mode more troublesome and expensive. But this cannot be done in *assumpsit*, which may be the reason, that no such action has ever been attempted. As early, as the 27th March, 1713, all authority in relation to guardian and ward, was committed to the Orphans Court, with an appeal, as the law now stands, to the Circuit Court, and afterwards to the Supreme Court. They were vested with the power of appointing guardians, and it is made the especial duty of the court to see that the trust is faithfully discharged, and for this purpose, they are clothed with authority, at any time to exact security from the guardian, may discharge him on his own application, or may dismiss him for malfeasance, or any other just cause, and compel him by attachment or sequestration to pay over the balance in his hands, and surrender all muniments of title in his possession.

In the 11th section of the act, it is directed, that when the minor has been fully paid, satisfaction shall be entered in the Orphans Court. When bonds have been taken in pursuance of the act of the 30th March, 1821, the condition of the bond is, to render a just and true account in the Orphans Court, and to deliver up the property of the minor, agreeably to the decree or order of the court. The third section of the act requires the guardian to settle once in every three years, in the same court, and at such other times as may be required by the court. These various acts evidently show that the legislature intended to devise a system complete in itself, by the erection of a tribunal with all the power necessary to afford adequate relief. Which view of the case, taken in connection with the act, which prescribes, that when a remedy is provided, a duty enjoined, or any thing is directed to be done, by an act of assembly, the directions of the act shall be strictly pursued, induced the opinion, that the Orphans Court alone, had the power to compel the settlement of a guardian's account. In *Denison v. Cornwell*, 17 *Serg. & Rawle*, 378, it was decided, that the Orphans Court were the proper tribunal to settle accounts between guardian and ward. For this purpose, they are clothed with the authority of a court of equity. They may examine the guardian on oath, to charge or discharge him, may compel the production of books or other documents, and in general, may exercise every authority necessary to enforce a faithful performance of the trust. The accounts of guardians consist of a variety of items, some very trifling in amount,



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and if the investigation must be conducted on the principles of the common law, injustice of the most glaring kind may frequently be the result, for unless the guardian be prepared in case of a disputed account with the proof of every voucher, his charge before a common law court will be disallowed. And to make this the duty of a guardian, in the course of a trial, which is frequently terminated in a single day, would be such an intolerable hardship, as to prevent persons from accepting a trust which cannot be attended with profit, but must necessarily result in trouble, and eventual loss. The Orphans Court may on the contrary, in the exercise of a reasonable discretion, allow time to procure proof of expenditures, or may supply the want of a regular voucher, (which ought to be done with great caution,) by the oath of the guardian himself. And this should be permitted, when from the nature of things, no regular vouchers can be attained, as for travelling expenses, going to, and returning from school, and others of a similar character. The office of guardian is one of peculiar trust and confidence; it is therefore of importance that we should adopt no rule, which may prevent men of the first integrity and character, from accepting the trust.

It is said, that *Denison v. Cornwell* is contrary to the practice. Of this practice, so confidently relied on, no one member of the court is aware, and if so general, as to furnish a rule for decision, it is singular, that not a trace of it should exist in the books. The case of *Denison v. Cornwell*, has alone been produced, and which establishes a rule directly the reverse. Whether in any case, a minor would be concluded by an account settled in his minority, it is not necessary to decide. It is, however, plain he would not be prevented from impeaching an account, settled in the Orphans Court, in pursuance of the third section of the act of 1821. In directing a settlement, once in every three years, the legislature intended it as a measure of precaution, an additional security to the infant. By the settlement, the court and the friends of the infant, have an opportunity of knowing the situation of the estate; if there is any reason to apprehend injury to the rights of the minor, measures may be taken to guard his interests, either by dismissing the guardian, or compelling him to give additional security for the performance of his duty. Such a settlement would not conclude the infant, and it may be doubtful, whether it would be even *prima facie* evidence in favour of the guardian. The Orphans Court would have the power to compel a re-settlement of the account, after the infant attained his age. Such a settlement alone would be conclusive, upon both guardian and ward.

Doubts have been expressed whether the Orphans Court have power to enforce their decrees. It has been said, that resort must be had for that purpose to the common law courts. After settlement, an action of *assumpsit* will lie, to enforce payment of the

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balance; but, it is by no means conceded that it is the only, although it is the usual remedy. By the 8th section of the act of the 27th March, 1713, the justices may send their attachment for contempt, and may force obedience to their warrants, sentences and orders concerning any matter or thing cognizable in the same courts, by imprisonment of the body, a sequestration of lands or goods, as fully as any court of equity may or can do. As early then, as the first organization of the court, full and plenary authority has been given them, by attachment or sequestration, to enforce compliance with their order or decrees.

By the death of *Henry Herr*, the guardianship ended, and if there was a balance in his hands, the minor became a creditor of the estate, and this the administrator may be compelled to settle and pay over. Whatever the deceased has received in his individual or fiduciary character, his representatives may be compelled to settle, either by attachment or sequestration, as in the case of the guardian himself.

Judgment affirmed.

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BENJAMIN HART, for the use of JOHN SHAUB, *against* MICHAEL WITHERS, GEORGE WITHERS, and JOHN WITHERS, trading under the firm of JOHN WITHERS, & Co.

IN ERROR.

One partner cannot bind his co-partner by deed, although it be given in a transaction in the course of the business of the firm, and the benefit of the contract be received by the firm.

In such case where an award had been made against the defendants, and by agreement they were let into a defence *on the merits*, without being in *any degree* prejudiced by the award, in their defence, they are not precluded by the agreement from putting in the plea of *non est factum*, and availing themselves of the fact that the instrument declared on, was executed but by one of the firm only.

But if such agreement had that effect, it would be waived by taking issue on the plea of *non est factum*, instead of moving to have it struck out.

When suit is brought against several partners upon a sealed instrument, executed by one for all, the plaintiff cannot recover against the partner who actually executed the instrument alone.

ERROR to the District Court for the city and county of Lancaster.

In that court it was an action of covenant, brought by the plaintiff, who was also plaintiff in error, against the defendants, upon the following agreement:

"Be it remembered, that on the 13th day of January, 1816, I have purchased of *Benjamin Hart*, forty acres, or as much more as

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he may choose to let me have of woodland on the place said *Hart* bought of *Joseph Miller*, in Colerain township, at the rate of twenty-four dollars per acre. The cutting to begin at the corner near *John Caughey's* field, and from thence along the road to the lower end of the meadow on said place, and to cut back in regular proportions or distances from said road; and I do hereby agree to give to said *Hart*, as soon as the quantity is surveyed, three notes for the amount, payable at either of the banks in Lancaster county, in equal proportion: the first note payable on the first day of July next, the second on the first day of October thereafter, and the third and last payment on the first day of January following. It is further agreed that I am to give said *Hart* two thousand good and sufficient chesnut rails out of said wood cutting, for which I am to have a credit of thirty dollars on the amount of the wood. The wood to be all cut before the first day of May, 1817, and the wood to be coaled in the same season. In witness whereof, I have hereunto set my hand and seal the day and year first above written.

*John Withers, & Co.*

Witness,  
*William Murray,*  
*Joseph Miller."*

The plaintiff entered a rule of reference, under which arbitrators were appointed, who on the 10th November, 1818, made an award in favour of the plaintiff for eleven dollars and seventy cents with costs. On the 22d March, 1820, the attornies of the parties agreed "that the award of arbitrators in this cause should stand as a security for the sum, if any, which shall hereafter be found to be due on trial; and that the defendants are to be let into a defence upon the merits, without being in any degree prejudiced by the award in their defence."

The pleas of the defendants, upon which the cause was put to issue, were *non est factum*, and performance with leave, &c.

On the trial, the plaintiff, after proof that the article of agreement on which suit was brought, was executed by *John Withers*, but not in the presence of the other partners, offered in evidence in connection with that agreement: "the agreement entered in the cause by the attornies to try the cause upon the merits, and to show that at the time of entering into the article, *John Withers*, *Michael Withers*, and *Geo. Withers*, were iron masters in company, that they acted and transacted business for each other, by one executing deeds in the name of one for the use of all of the company. That the whole proceeds of the timber were taken to the company works, and there used for the joint interest of the company, with the full approbation of all the defendants."

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This evidence being objected to, was rejected by the court, and a bill of exceptions sealed.

The plaintiff then offered this evidence against *John Withers* (the party who executed the article) alone, this was also objected to, rejected by the court, and another bill of exception thereupon sealed.

These bills of exception were severally assigned for errors.

*Jenkins* for the plaintiff in error, contended that the evidence was competent to charge the defendants upon the contract declared upon by the plaintiff. It was incumbent on the plaintiff to prove that the defendants were partners, that the contract related to the partnership business, and that the deed declared on was the deed of all the partners. The evidence offered went to establish all these points. As a general rule it is conceded one partner cannot bind his co-partners by deed, but the partners may agree to be bound in that way, and then the deed of one would be binding on all.

1. What agreement will confer this power ?

2. What is the usual proof of such agreement ?

It is not necessary that such agreement should be in writing, or under seal, it may be by parol. *Watson on Part.* 163. As to the evidence of assent necessary to constitute such agreement, it has been held, that if they are present when the partner executes the deed, the co-partners will be bound ; and this although silent when it is done. Their assent is in that case inferred. The evidence of assent may be either express, or inferential. It will be inferred from the acts of the parties at the time, or their subsequent approbation ; as where one partner for his private debt binds the firm, and subsequently the other partners assent to it, they are bound, and this too in a transaction not of the partnership. *Watson on Part.* 169. The evidence offered went to establish this assent by proof, that the contract was beneficial to the partnership, that the fruit of it had been enjoyed by the firm, and that their usual course of dealing warranted this form of binding the firm. If the evidence did establish the assent of all the partners then they were all bound. This was for the jury to determine. One partner cannot bind the firm in a collateral guarantee, but the assent of the other partners to such transaction will bind them ; and it is competent to show this by proof, that the partners usually gave such guarantee. *Chit. on Con.* 74. If these partners wished not to be bound by this deed, they should have disclaimed it. *Elliott v. Davis*, 2 Bos. & Pul. 338. Silence is evidence of assent in many cases. 2 *Starkie : Ev.* 38. If one sell the land of another in his presence, and he is silent, he cannot afterwards assert his title. To permit him to do so would be a fraud on the purchaser. And in our case, if in point of fact, to bind

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each other by deed, was the mode of dealing of these partners, it would be to permit a gross fraud not to receive evidence of it to bind them. A deed executed by one partner for all, may become binding by subsequent acts of ratification. *Skinner v. Dayton*, and others, 19 *Johns. Rep.* 513. This case also shows that authority to bind partners by deed, may be by parol. But the evidence offered should have been received against *John Withers*, who executed the article. Where a judgment bond was given by one partner in the name of the firm, a judgment entered on it, although not binding on the partner who did not execute it, is on him who did; and the court will permit the name of the former to be stricken out; and the judgment to stand against the latter. *Gerard v. Basse*, 1 *Dall.* 119. 1 *Black. Rep.* 1133. *Green v. Beals*, 2 *Caines R.* 255. 4 *Esp. Rep.* 220. The agreement upon which the defendant was let into a defence, was an agreement to try on the merits; and on this ground the evidence should have been received. It never was intended under that agreement that the defendants should be permitted to avail themselves of a defence purely technical, which this is.

*Buchanan*, contra, contended that no position was better established than that one partner cannot bind another by deed. *Wats. on Part.* 160. The receipt of the consideration by the partners will not make it their deed, although it may be in a partnership transaction. *Harrison v. Jackson, et. al.* 7 *Term. Rep.* 207. This case is no way distinguishable from that before the court. It was a partnership transaction, on a full and valuable consideration received by the partners, and one partner executed the deed for all.

In all commercial transactions one partner is considered the authorized agent of the co-partners, and they are in contemplation of law virtually present at, and sanctioning the proceedings of each other; but this holds only as to simple contracts. *Taylor v. Coryell*, 12 *Serg. & Rawle*, 243. Authority to one partner to bind others by deed, must be created by deed, no subsequent parol acknowledgment will do. 2 *Caines R.* 255. *Chit. Con.* 78. The case in *Wats. on Part.* 163, is where the partner executed the deed in the presence of his co-partner, with his express assent, and as the deed of both: there both are considered as having executed it, the seal being adopted by the partner, who stood by, when it was put to the paper. But it is a very different case from ours, proceeding upon a principle no way connected with the doctrine of partnership. True in commercial transactions, Mr. Chitty says that subsequent assent is sufficient to ratify any thing done under the several power of the partners to bind each other; but this is confined to commercial transactions and to simple contracts. In such cases the authority is implied, and subsequent acts and acknowledgments will certainly confer it. But it is not so with regard to a contract by deed, and

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at all events, there is no case, where upon the plea of *non est factum*, it was permitted to the plaintiff to prove the deed by evidence of subsequent assent on the part of the defendant. Upon this plea no evidence is competent but proof of actual execution.

The case in 19 *Johns. Rep.* 513, was not between a stranger and the partners, but between the partners themselves, in which one partner asked contribution for money recovered against him on a deed executed by him for all, and in the name of all the partners. The question in that case was not upon the deed, and on the plea of *non est factum*, but it was collateral to it; and very properly the enquiry was permitted as to the beneficial nature of the contract to the firm, and subsequent acts of ratification by the other partners. If a recovery had been had against *John Withers* alone on this article, and he had brought suit for contribution, and offered evidence that the benefit of the contract had been recieved by the firm, then this case would be an authority.

*Hopkins* in reply: these partners had authority to contract for each other, to promote the object of the concern. Here the fruit of the contract went to the use of the partners, and the contract was made in the course of their business, and for their benefit. It is therefore a defence stripped of all equity, a mere legal shadow, and without justice. The action is an action of covenant, which in Pennsylvania is an equitable action. *Kuhn v. Nixon*, 15 *Serg. & Rawle*, 125. At law there is enough to avoid this technical defence, but in equity there is no doubt. Assent is essential to constitute a contract, but it may be either precedent, concomitant or subsequent to it, and in either case, the same effect, a binding contract is produced. Here the proceeds of the contract were received and used by the company with a full knowledge of the contract, surely this amounted to an affirmance of it. *Watson on Part.* 163. The operating reason for the rule that one partner cannot bind his co-partner by deed, is that the consideration of a deed cannot be inquired into. This reason does not prevail in *Pennsylvania*, here the consideration is open for inquiry in our courts of law; in *England*, in equity only, can this be done; and it would be against mercantile policy to allow the funds of the firm to be hung up until this question could be decided in equity. And in *England*, Lord *Mansfield* held in a case at *nisi prius*, it is true, that where the debt was a partnership debt, one partner may give a bond for it, binding on the firm. But if the assent of the partners is given, there is an end of all reason for the rule. It is clear that where the partner is present when his co-partner executes a deed in the name of both, although there is no evidence of express assent, both are bound. Here the authority is by parol, and the assent is inferred from the presence, and silence of the partner. It establishes that assent may

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be shown by proof of circumstances: this being established, it is manifest that circumstances necessary to evidence such assent, will be as various as the transactions of men are diversified; and the question must be submitted to the sound discretion of a jury. Mere presence is held to be sufficient evidence of assent; other circumstances may exist to demonstrate it more satisfactorily; and it would be incongruous to say that actual presence alone is sufficient. One may seal for many, and if all consent, it is the seal of all, whether there be one or many seals. It is the consent then, and not the manual operation of sealing which makes the instrument. *Randall v. Van Vechten*, 19 Johns. Rep. 60. In this case there was a mere resolve of the corporation to pay five hundred dollars on the contract, and it was held such evidence of assent as would bind the corporation. The evidence of assent is much stronger in the case now before the court. He referred also to *Buchanan v. Curry*, 19 Johns. Rep. 137. Although the case in 19 Johns. 513, is a case of contribution, the whole court went upon the principle that subsequent ratification and assent were equivalent to actual execution by all the partners. But the agreement to try on the merits, controls the defence, and excludes the defendants, from ground purely technical, and stripped of all equity.

The opinion of the court was delivered by

GIBSON, C. J.—The law of partnership is part of the law merchant, which has respect exclusively to the business of commerce: and as sealed instruments do not ordinarily enter into it, the authority of a partner being limited to the scope of the trade, is held to be incompetent to the execution of them. There may, indeed, be a partnership to carry on a business not purely commercial; still, however, the authority of the partners is regulated by the usages of trade. The measure of this authority allowed by the law merchant, being graduated to the exigencies of commerce by experience, is the wholesome and the convenient one; nor ought we, by an apparent hardship to be drawn into a desire to enlarge it. Undoubtedly the partnership had the benefit of the plaintiff's wood; but he thought fit to furnish it on separate account; and even if he supposed in point of law that the covenant of the party who sealed the deed, bound all the defendants, yet that, as we have lately determined in *Moser v. Lebenguth*, (M. ss.) is not such a mistake as would entitle him to equitable relief; much less can we on the ground of an equity between the partners themselves, say that an instrument is a deed in equity, which is not a deed at law. That even a court of plenary chancery powers will interpose for or against a stranger, on the foot of such an equity, admits of more than a doubt. *Skinner v. Dayton*, is not that case; and I cite it mere-

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ly to dissent from a point of doctrine asserted in it, on the authority of *Ball v. Dunsterville*, 4 Term Rep. 313, that an authority to one partner to bind the others by deed, may in some cases be by parol. I am at a loss to conceive how that case can be deemed an authority for the conclusion deduced from it. It was the case of a bill of sale, sealed by the one in the presence of the other, and delivered as the act of both; and it is therefore clear that the validity of the execution was not supposed to depend on the existence of a previous authority. A thing done in the presence of another and at his request, is his immediate act; as for instance the administration of an oath in the presence of a judicial officer, who by the bye cannot appoint a deputy. One may adopt as his own, a seal affixed by another without his authority, or even against his will, and the delivery, being his immediate act, makes the instrument his immediate deed. The law is fixed and certain, that the authority of any agent to bind by deed, can in no case or under any circumstances be by parol.

But it is alleged that the plaintiff was entitled to treat this as the covenant of all the defendants, by their agreement in the cause. He had obtained an award under the arbitration act, and the defendants, instead of appealing, agreed to let it stand as a security for what, if any thing should be found due, on terms of being "let into a defence on the merits, without being in any degree prejudiced by the award, in their defence." This word "merits" has certainly no technical or definite meaning; but I cannot understand how a defendant can be without merits, who cuts up the plaintiff's title by the roots, by showing that he never entered into the covenant, which is the foundation of the action. Surely the avoidance of a conveyance by the statute of frauds, would be matter of defence on the merits in an ejectment. What was the object of this agreement? Plainly to place the defendants in the situation in which an appeal would have placed them; and in consideration of the expense and trouble thus saved, can it be supposed that they consented to yield the whole ground of their defence, or at least an impassible part of it? It seems to me that if any thing were wanting to shut out such a conclusion, it would be found in the stipulation, that they were in no degree to be prejudiced in their defence by the award: in other words that for all the purposes of defence, they should be put in the attitude in which they stood before the reference. It was in their power, by appealing, to obtain the advantage of this defence, and it seems to me they ought not to be deprived of it by any thing less than a precise and positive relinquishment. But even if the agreement were such as it is supposed to be, the effect of it was waived by taking issue on the



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plea of *non est factum*, instead of moving to have it struck out. Having thus staked his case on the existence of a fact, the plaintiff could not afterwards object to any evidence, which was pertinent and competent to prove it.

HUSTON, J.—In this case I will state very briefly the grounds on which I cannot concur with the opinion of the court.

The grounds on which one partner is not permitted to bind the other by deed in England do not exist, or at least, all of them do not exist here. They are 1st. That the consideration of a deed cannot be enquired into—here it can. 2nd. That a bond will bind the lands of any partner who has lands after his death—here a common note, nay account is recovered after the death of the debtor out of land. It is admitted even there, that one partner may bind another by bond sealed in his presence, although with but one seal. This must be solely because his assent is clearly proved by his being present and agreeing, not dissenting; now I cannot see why assent clearly proved in one way is not as effectual as assent clearly proved in another. Here the offer was to prove that each of the partners, who were iron masters and had lands in partnership, as well as chattels, were in the constant habit of making contracts under seal, which were ratified by the others, and the benefits enjoyed by them—that this contract on the face of it for wood, was for wood for their ironworks, and was actually used at them, and the benefit enjoyed by them all. I would then have permitted this to go to the jury, and if they found a clear assent either before or after, I would hold them bound. One partner is often bound in equity, differently from what he is at law, because he has received the benefit. *Lang v. Kepple*, 1 Bin. 123. I would confine the power to partnership transactions, and to property which came into partnership, and was enjoyed by them under a contract, which they knew was made by one of the firm. I would consider the case of partners, whose principal property was real estate, as more within the reason of what I have said, and hold them bound by lease, and other agreements affecting lands, wherever the whole company knew of, acted under, and derived advantage from such contract. As to the agreement by which the judgment was opened, and to try on the merits, whenever any person applies to open a judgment, he is bound to state all the objections which he then has, and every rule and principle, and practice requires this. No person should be permitted to make successively several objections, all of which existed at the same time. I would consider *George* as waiving all objections, except the one stated in his affidavit, viz. want of notice, and opportunity of appearing before the referees. But further it was not agreed to set aside the judgment, it stood as

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a judgment, and the trial was only to ascertain the amount. The article of agreement was merged in the judgment, and ought to have been admitted to prove the price, and quantity of wood, and to show that no receipts were endorsed on it. I am perfectly satisfied the result of this agreement is directly contrary to the understanding of at least one of the parties to it, and to what was intended by both when it was made; or if one intended this plea, such intention was not made known. I would on the agreement consider this objection as not allowable.

ROGERS, J., dissented on the point as to the effect of the agreement to open the judgment, and let the defendants into a trial on the merits.

Judgment affirmed.

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PETER SNYDER *against* HENRY ZIMMERMAN, and another.

IN ERROR.

The bail on an appeal from the award of arbitrators, under the compulsory arbitration act, is not subject to the practice in reference to special bail. Where the appellee is dissatisfied with the bail, his course is to apply to the court for a rule for additional bail, and the opinion of the court that the bail is sufficient, is conclusive; he cannot treat it as a nullity, and issue execution.

Bail may be dispensed with altogether, and suffering a term to pass without objection on the part of the appellee, dispenses with it.

WRIT of error to the District Court for the city and county of Lancaster.

The case was this, on the 1st of November, 1824, an award under the compulsory arbitration act, was filed against the defendants for three hundred and ninety dollars and ninety-two cents: they appealed, and *Richard Ream* entered into the recognizance as their security; on the 27th of November the plaintiff's attorney excepted to the bail entered, on the 1st December notice of the exception was proved, and filed. On the 6th of December a new recognizance was entered into by *Curtis Ream* as security; on the 13th December the plaintiff excepted to *Curtis Ream* as bail. On the 18th, notice of this exception was given, and on the 31st *Curtis Ream* made an affidavit, which was endorsed on the back of his recognizance, "that he was a freeholder worth

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eight hundred dollars, after paying all his debts." This affidavit was made before the Mayor of the city of Lancaster. The plaintiff disregarding the appeal, issued a *fi. fa.* to June term, 1825, on which a levy was made on the personal and real estate of the defendants, who gave notice to the sheriff not to sell. The sheriff sold the personal property, and the 13th August, 1825, held an inquisition on the real estate, and on the 28th of August sold it. On the 5th of December, 1825, a rule to shew cause why the *fi. fa.* &c. should not be set aside, was obtained, and on the 17th June, 1826, the rule was made absolute and restitution awarded.

The District Court sits on the second Monday in June, and on the first Monday of September. This writ of error was taken by the plaintiff, who now assigned for error, that

1st. The award of the 1st of November, 1824, was not appealed from, the bail attempted to be given being entered without notice to the plaintiff and therefore a nullity.

2d. The bail entered after the exception taken to the first bail was without notice to the plaintiff, and without justification, and therefore illegal and void.

3d. The Mayor of the city of Lancaster had no authority to take the affidavit made by the bail, and it did not therefore amount to a justification.

*Hopkins*, for the plaintiff in error, contended that bail on appeal from the award of arbitrators should not be permitted to be entered without notice to the appellee. Under the act of Assembly, *Purdon's Dig.* 20, certain requisites are required to enter an appeal, and these must be literally observed. The omission of the word *firmly*, in the oath required upon the appeal has been decided to be fatal to it. It is of much more consequence that sufficient bail should be entered. The party to be affected has an undoubted right to call in question their sufficiency. But how can he have the exercise of this right unless notice to him be required. The prothonotary is but a ministerial officer, and bound to receive the bail offered *de bene esse*. If the bail is not entered, it is the duty of the prothonotary, at the request of the party in favour of whom the award is, to issue execution. He referred to *Donaldson v. Cunningham*, 13 *Serg. & Rawle*, 243.

The case of *Jones v. Badger*, in 5 *Bin.* 461, is not like this case, for there the appellants gave notice that the cognizors would answer any questions. Without this notice, the appellant may enter whom he pleases, and the provision of the act of Assembly for sufficient security is inoperative. But after notice of exception, at all events new bail cannot be entered without such notice.

In England, the party must give notice of entering special bail, and without such notice the bail is a nullity. 1 *Archb. Prac.* 80. Here after exception had been taken, the new security, without

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notice to the party, justified before the Mayor, who had no authority, to receive such justification. Bail must be taken before a person having competent authority, before the court, a judge, or a commissioner of bail, *Jones v. Badger*, 5 Bin. 462. In the incipient stages of a cause, if notice is not given of entering special bail, the plaintiff may sue the bail bond, and in error, if the bail do not justify upon notice, the bail may be treated as a nullity, and execution issued.

*Porter and Buchanan*, for the defendants in error, were requested by the court to confine their argument to the third error assigned.

They argued that whether the Mayor had the power to administer this oath to the bail or not, was a matter of indifference. The appeal was regularly entered, and if the appellee were dissatisfied, he should have applied to the court, he could not disregard the appeal and issue execution. The right of appeal is liberally construed to preserve the trial by jury, which the arbitration law in some sort impugns. By the terms of the act of assembly, no notice is required of entering bail to obtain an appeal, and it has never been the practice to give such notice.

The rules as to the mode of entering special bail are not applicable to entering bail for an appeal under the arbitration act. This was long ago decided in *Jones v. Badger*. But the justification was well taken before the Mayor. Administering an oath both here and in England is a ministerial act, and the Mayor had power to administer oaths, which is enough. They referred also to *Means v. Trout*, 16 Serg. & Rawle, 349.

In case the appellee was dissatisfied, application should have been made to the court at the next term after exception taken. *Zeigler v. Fowler*, 3 Serg. & Rawle, 238. *Cochran v. Parker*, 6 Serg. & Rawle, 549. Here he suffered that term to pass, and comes too late upon this exception.

This writ of error is not well taken, and should have been quashed: an appeal is still pending, and there is no final judgment in the case, *Gardner v. Espy*, 1 Penn. Rep. 73, and the execution could not be issued in the face of the appeal.

*Hopkins*, in reply. We excepted to the bail, and it was for them to justify; and they should have done this by the next term, and it is they who have slipped their time.

The Mayor has no greater or other power in this respect than a justice of the peace; and if a justice has the power to take the affidavit of justification on exception to special bail, he must hear and determine the question judicially, which must be incongruous.

Two terms elapsed after execution was issued before application to the court to set it aside, such application was then out of time.

A motion to quash the writ of error cannot now be entertained. After joinder in error such motion is never received.

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The opinion of the court was delivered by

GIBSON, C. J.—The bail in an appeal is not subject to the practice in reference to special bail. Where the appellee is dissatisfied, his course is a rule for additional bail; but where, as here, the court is of opinion that the bail is sufficient, there is an end of the matter. The allegation that the justification was before an alderman, is inaccurate in point of fact. The affidavit of sufficiency was merely sworn to before the alderman, who did nothing more than administer the oath, as under his general powers he might well do. But even were the appeal erroneously taken, the appellee precluded himself from insisting on it. Whether erroneously or not, it was actually taken, and could not be treated as a nullity, without having been formally quashed. Bail may be dispensed with altogether, and it has been repeatedly determined that the appellee does dispense with it by suffering a term to pass without objection. Here there was an appeal actually taken which is still depending; and the execution having issued without a valid or existing judgment to support it, was properly quashed.

Order of the Common Pleas affirmed.

M'KIM and ARMSTRONG, *against* SOMERS.

IN ERROR.

Where the plaintiff interrogated defendant's witness, as to a conversation which had taken place between him and a certain W. B. ; and the witness stated the conversation, by which it appeared that he had not told W. B. all that he related in court, and the plaintiff then asked him "why did you not tell the whole truth to W. B.?" And the witness replied "I kept it back because I was living in plaintiff's house, as tenant, and if I had told it, he would have thrown me out neck and heels, he would have knocked my brains out ; as soon as he did know it, he took out a landlord's warrant," and the plaintiff then called W. B. and by him gave evidence to contradict the statement made of the conversation: *Held* that it was competent to the defendant to give evidence, that the plaintiff was a quarrelsome and dangerous man to those he had a prejudice against.

Wherever a person has colour of authority, and acts under a commission from the appointing power, but which it may be alleged has been forfeited by some act, perhaps of an equivocal nature, in all such cases the validity of the commission cannot be examined in a suit in which he is not a party. If a person usurp an authority to which he has no title, or colour of title, his acts would be simply void. But a colourable title to an office, can be examined only in a mode in which the officer is a party, and before the proper tribunal, the Supreme Court, in whom by act of assembly all the authority of the King's Bench is vested. It is not therefore competent, when a deposition is offered in evidence, and the commission of the justice of the peace, before whom it was taken, is shown ; to prove that, after he was commissioned, he removed out of his proper county, where the deposition was taken, and thereby vacated his office.

When a party has an opportunity of being present at the taking of a deposition, and does not choose to avail himself of it, he shall not afterwards be permitted to except to a leading question, and answer in such deposition, or to make formal objections against it. When a party attends, and objects to the form of the question, then if the opposite party persists, he does it at his peril.

ERROR to the District Court for the city and county of Lancaster.

On the trial of this cause, the defendant, who is also the defendant in error, for the purpose of proving a payment of one hundred and twenty dollars to the plaintiffs, examined a witness of the name of *Jeffries Marsh*, who in his examination in chief, testified to the fact of the payment. For the purpose of destroying the testimony of the witness, the plaintiffs interrogated him, on his cross examination, as to a conversation which had taken place between him and a certain *Wallace Boyd*. The witness stated the conversation, by which it appeared, that he had not told to *Boyd*, in that conversation, all that he related in court. Whereupon the plaintiff's counsel asked him the following question : " Why did you not tell the whole truth to *Wallace Boyd* ? " To which he replied as follows : " I was not on my oath, and I was not bound to confess to *Wallace Boyd*. The reason I kept it back was, I was living in *Wm.*

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M'Kim's house as tenant, and if I had told it, he would have thrown me out neck and heels. If I had begun that kind of talk, he would have knocked my brains out; you would not have been troubled with judge and jury. As soon as he did know it, he took out a landlord's warrant." After the defendant had gone through his testimony in chief and rested, the plaintiff called *Wallace Boyd* for the purpose, among other things, of contradicting the statement made by *Jeffries Marsh*, of the conversation which he alledged he had had with *William Boyd*. The defendant then offered to prove by *Boyd*, that M'Kim was a quarrelsome and dangerous man to those he had a prejudice against; to this testimony, which was received by the court, the plaintiff excepted. The plaintiff also objected to the admission of a deposition in evidence, on the ground that *Joel C. Bailey*, the person before whom it was taken, was not a justice of the peace. On the objection being made, the defendant read in evidence a commission from the Governor, bearing date the 28th March, 1821. The plaintiff then offered to prove "that since the date of the commission the said *Bailey* removed from the county of Chester." (in which he had been commissioned, and where the deposition had been taken,) "to the city of Philadelphia, that he rented a tavern in the city, and kept a tavern there for eighteen months, and afterwards returned to reside in Chester county; that during his residence in Philadelphia, another justice was appointed in his stead, in the district where *Bailey* had been a justice." The court refused to receive this testimony, and admitted the deposition, and sealed a second bill of exception. The plaintiffs, who were present when the deposition was taken, but objected to its being taken, on the ground that *Bailey* had no authority to take it, and took no part in taking it, objected to the admission in evidence of this question, and answer in the deposition. Question by defendant, "did captain M'Kim tell you that he had received one hundred dollars of me in *Wilmington* and *Brandywine* money." Answer "yes." The court overruled the objection and the bill thereupon sealed constituted the third bill of exceptions. The plaintiffs in error, who were also plaintiffs below, now assigned error in each of these bills of exception.

*Parke* for the plaintiff in error. The plaintiffs did not attempt to disprove the reason why the witness had not told *Boyd* the whole truth, the evidence given by them went to impair his testimony on other grounds. The testimony then as to the character of M'Kim, was not in contradiction to any evidence given by the plaintiffs, but wholly irrelevant, and introduced to fortify a witness, who as to this point had not been attacked; and this too in violation of the well established rule, that the character of the party in a civil suit cannot be given in evidence. *Anderson v. Long*, 10 Serg. & Rawle, 60. *Nash v. Gilkeson*, 5 Serg. & Rawle, 352.

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Second bill of exception. The commission of a justice of the peace is vacated by his removal out of the county, (within which he is commissioned,) *animo residendi*. The county bounds the jurisdiction of a justice, the district for which he is commissioned is his residence. *Respublica v. McClean*, 4 Yeates, 399. *Commonwealth v. Sheriff of Northumberland*, 4 Serg. & Rawle, 275. It was proper to prove that the justice had by removal vacated his commission, and had consequently no power to administer the oath to the witness. *Osburn v. Ross*, 3 Bin. 539. The deposition could only be taken by a person having that power. *Keller v. Nutz*, 5 Serg. & Rawle, 246.

The defendant is not helped by the distinction between officers *de facto* and *de jure*. There cannot be a justice of the peace *de facto*; he exists *de jure*, or not at all. An officer *de facto* comes in by colour of right, in which case his office is vacated on a *quo warranto*. A bare swearing in and acting does not make a man an officer *de facto*; and unless there is some form of election, he is a mere usurper. *Rex v. Lisle*, 2 Strange, 1090. *Andrews*, 163. *Baird v. Bank of Washington*, 11 Serg. & Rawle, 411. If a justice resigns he ceases to be a justice, and any act done by him after such resignation, would be the act of a mere usurper. His removal from his proper county has the same effect, it vacates his office *de facto* and *de jure*; after this he could not be sued for any act done as an officer, for which otherwise he would have been officially responsible; nor would the individual who made a deposition before him, be indictable for perjury in case the deposition was false. Public policy too, requires, that in this country, where officers are continually changing by election or appointment, that their power should cease as to all the world, when they go out of office.

As to the third bill of exception, he contended that where the party refuses to take any part in taking a deposition, he must be considered as absent, and in that case, if a leading question be put and answered, and received in evidence it would be error.

*W. Hopkins* and *Hopkins* for the defendant in error, were desired by the court to confine their argument to the 2nd bill of exceptions. Whether the justice of the peace, before whom the deposition was taken had *de jure* a right to exercise the powers of that office, was not open for enquiry in a collateral proceeding. It was enough to show, as was done by producing his commission, that he acted by colour of office, in the district for which he had been appointed. Indeed as to third persons, it is enough to prove that he acted as a public officer, without producing his appointment. *Porter v. Luther*, 3 Johns. R. 431. He is an officer *de facto*, and that is all we were required to show, and where such officer claims to exercise his office, his right cannot be brought into question in a proceeding to which he is not a party. *Commonwealth v. Fowler*, 10 Mass. R. 290. In all collateral controversies, in which the officer *de facto* is not a



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party, his acts are conclusive as to his authority. *Parker v. Luffborough*, 10 *Serg. & Rawle*, 249. *Baird v. Bank of Washington*, 11 *Serg. & Rawle*, 411. *Riddle v. County of Bedford*, 7 *Serg. & Rawle*, 386. The attempt in a collateral way to enquire on the part of third persons into the complicated question, as to the right particularly of a judicial officer to exercise his office, must be always abortive as it respects the officer, who would not be bound by a proceeding in which he is no party, and productive of an obstruction of justice, as it regards others, who are usually ignorant of the precise circumstances in regard to the authority claimed and exercised. The cases relied on by the plaintiffs in error, are cases in which the officer was himself a party, instituted for the very purpose of enquiring into the authority by which he claimed the office, and in some of these cases the distinction is taken between such direct enquiry, and where it is made in a collateral proceeding. In the former the right may be enquired into, in the latter it cannot.

*Buchanan*, in reply. The question put to the witness as to the reason why he had withheld the whole truth from *Boyd*, was a pertinent question, and the answer of the witness was uncontradicted, and should never have been permitted to be made the ground of an attack upon the plaintiff, calculated to have an influence upon the jury, wholly distinct from the object professed. *Starkie Ev.* 4 *pt.* 366. Neither reputation of character nor facts establishing character are proper for enquiry, even although the character of the party is incidentally in issue, by charging a fraud upon him. *Phil. Ev.* 139. Were it otherwise, an endless enquiry would be opened. If the party could get a witness to say his adversary was a quarrelsome man, he may, to corroborate his witness, according to the doctrine established by the court below, go into proof that he is quarrelsome, and then an interminable investigation is open as to circumstances of provocation, the measure of revenge, or the nature of transactions involving the acts of his whole life, and leading off from the issue between the parties.

Second bill of exception. There was no attempt on the part of the defendants to prove that the justice was an acting justice of the peace, but he relied on his commission to establish, that *de jure* he was such justice. If it had been proved that he acted as a justice, the case might fall within the principle of some of the cases cited, giving to his acts the character of those of an officer *de facto*. But that point is not presented, but the enquiry is, whether an individual, who does a *single act* as a judicial officer, shall be considered as having full power to do that act, without any right on the part of those who are effected by it, to enquire into his authority. It is an important right to have witnesses examined in open court, in the presence of the court and jury; but to permit a deposition to be taken by a person who is without power to administer an oath, and as a consequence, that the witness shall not be responsible for false swearing in taking that

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oath, is a monstrous violation of the wholesome principles of the common law.

The cases relied on by the defendants in error, are cases of ministerial officers, whose authority had been conferred, but some requisites omitted: as to third persons, their acts are not open to enquiry. But in no case has it been held, that it may not be shown that a person claiming to exercise a judicial office has no authority to do so; and that the fact of his acting, is conclusive upon third persons as to his right to act. 4 *Starkie Ev.* 4 pt. 1135.

On the third bill of exceptions, he referred to *Wihers v. Gillespy*, 7 *Serg. & Rawle*, 10. *Sheeler v. Speer*, 3 *Bin.* 132. *Strickler v. Tod*, 10 *Serg. & Rawle*, 63.

The opinion of the court was delivered by

ROGERS, J. (who recapitulated the facts of the case.) When it is recollected that *Jeffries Marsh* was a principal witness for the defendant, and that the plaintiff had attempted to impeach his veracity on his cross-examination, and by the evidence of a witness, to contradict him, it became a matter of vital importance to the defendant and the witness himself, that he should be sustained. It is in vain for the plaintiff's counsel to say, that they had not attacked the character of the defendant's witness, for this is expressly contradicted by the bill of exceptions. *Marsh* says the reason he did not tell to *Wallace Boyd*, what he knew of the payment, was a fear arising from the violent temper of *William McKim*. And this reason, if true to the extent stated, would account satisfactorily to the jury, for the suppression of part of what he knew in relation to the alleged payment. It became then important that facts should not rest upon his testimony alone; and there can be no doubt that the defendant would have a right to fortify his case by proving by other witnesses, the truth of the facts stated by him, as reasons for his conduct. For instance, it would have been competent for him to show that the witness was living at the time in *McKim's* house as tenant, and also to prove that as soon as *McKim* knew he had spoken about it, he had taken out a landlord's warrant. But it is said that the evidence which is admitted is putting the plaintiff's character in issue, and that this cannot be done in an action of *assumpsit*, and for this the plaintiff's counsel have cited *Philips* and *Starkie*. No person pretends to dispute the general principle. This is not an attempt to put in issue the character of *William McKim*, but to prove from the knowledge of the plaintiff's witness himself, the fact that *William McKim* was a quarrelsome and dangerous man, to those he had a prejudice against. And this evidence, it will be recollected, is given to shield the character of a witness who had been attacked by the plaintiff. If this evidence leads to an enquiry which might effect

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the standing of *M'Kim*, he has his own counsel to thank for it; for it was in answer to an enquiry from them, that he gave the reason why he did not state to *Wallace Boyd*, all he knew of the transaction. Had the counsel for the defendant omitted to prove the temper and disposition of *M'Kim*, no doubt the jury would have been told that it was a mere excuse, totally untrue, resting on his own statement, and perfectly ridiculous in itself. The temper of *M'Kim* gave probability to the reason assigned by the witness, and in this point of view it was material that no doubt should rest upon it. It is too much the habit of counsel to abuse and villify witnesses. It is the duty of the court to protect them, by affording them some latitude to defend themselves from the slanders which are often heaped upon them. Under the peculiar circumstances of this case, we are clearly of opinion that the testimony was rightly admitted by the court.

The plaintiff also objected to the admission of a deposition in evidence, on the ground that *Joel C. Bailey*, the person before whom the deposition was taken, was not a justice of the peace. Whether the facts alleged in the bill of exceptions would vacate the commission of the justice, we are not called on to determine. Whenever an information is filed, it will be time enough to determine the question. At present, we would think it improper even to intimate an opinion. And this is not accorded to *Mr. Bailey* as a favour, but is nothing more than common, even-handed justice, that he should have an opportunity of being heard, and be permitted, if occasion should require it, either to traverse the facts, or contradict the conclusions of law attempted to be drawn from them. It would be the height of injustice if we were now to determine, or even suffer his right to hold his commission to be called in question, in a cause in which he is no party, and cannot be heard. The counsel for the defendant objected to the court going into the question whether he was a justice *de jure* at all, and in this we conceive they were in the strict line of their duty. They contended, and with a force which has not been weakened by the reply, that it was sufficient for their purpose that he held a commission from competent authority, and that in taking the deposition, which is an official act, he was acting in the district for which he was appointed; that this constituted him a justice *de facto*, with at least colourable authority; and that as long as the commission remained, without being superseded by the Governor or vacated by the Supreme Court, the validity of his acts could not be questioned. One would have supposed that these reasonable objections would have been entitled to some respect. For, setting aside the extreme injustice of impeaching, or even impairing the right to an office, without giving an opportunity of hearing to the party principally effected by the decision, the inconvenience, and I may

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add, in some cases, the indelicacy of the inquiry, would be intolerable. If the plaintiffs had been heard in this preliminary matter, the opposite party would have been permitted to controvert the facts by the introduction of testimony on their part. And this would open a scene which I should be sorry to see exhibited in a court of justice. An examination would ensue before the court, which in some cases would last a week, whether a deposition should be received, in a cause of the most trifling nature and amount. As the court would be both judge and jury, the inconvenience of this novel doctrine would cause them to pause before they acceded to it. If I understood the counsel, they admitted the law in its full force, as respects ministerial officers, but denied it as regards judicial officers. I should have been pleased to have seen some authority in which the distinction is taken: the reason for such a distinction is not very apparent. If this be law, as regards ministerial officers, which may be shown by a host of authority. I say, *a fortiori* it should be so held in the case of judicial officers. The law is founded on policy and convenience, reasons which apply with tenfold force to officers of the latter description. The constitutionality of the laws establishing the several District Courts of this State has been denied by some, although I am not among the number. Would the Common Pleas of Lancaster, York, or the city of Philadelphia have a right to call in question the validity of the commissions of the judges of these courts, on an objection to the reading of a deposition? Nay more, would every court of Common Pleas, or justice of the peace in the State have the same power, would a justice of the peace or Court of Common Pleas have a right to question the commission of one of the judges of the Supreme Court, on an allegation of a removal from the State? We occasionally visit our friends in the neighbouring States, and it would be a singular spectacle if our offices should be vacated in our absence, on the plea that we had become citizens of another state. If this should be law, offices are held by a most precarious tenure. No court professing the slightest tincture of judicial science, have ever undertaken to examine the right to office, either on *writ of error*, *certiorari*, or when the matter came incidentally before them. In the *Commonwealth v. Bache*, this question came before the Supreme Court. *Richard Bache* was indicted for an assault and battery on Alderman *Binns*. The indictment contained two counts: one for an assault and battery; the other for an assault and battery upon Alderman *Binns*, while in the execution of the duties of his office. It was the opinion of the whole court, that Mr. *Binns*' right to the office he held, could not be questioned on the indictment; and we accordingly suspended giving judgment, and put *Bache* to an information, in the nature of a writ of *quo warranto*. This case is exceedingly strong, for the act of assembly

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enacts in express terms, that the acceptance of certain commissions named in the act, makes the commissions of alderman, justices of the peace, &c. null and void. It is strange that if the law be as stated by the counsel for the plaintiff in error, we have not some trace of it in some adjudged case, or elementary treatise.

The pivot on which the argument of the plaintiff's counsel turned, was that a false oath, taken before such a justice, is not punishable as perjury. For this I should also have been glad to have had some authority. So far from this position being correct, I find the law differently stated in 2 *Hawkins*, 89, a book of undoubted authority, and in a case bearing great analogy to the present. It has been adjudged, says the commentator, that a false oath, taken before persons, who having been commissioned to examine witnesses, happen to proceed after the demise of the King, who gave them their commissions, and before notice thereof, may be punished as perjury: for it would be of the utmost ill consequence to make such proceeding void; and therefore, though all commissions legally determine by the demise of the King who gave them, without any notice, yet for the necessity of the case, whatever is done before such notice, must be suffered to stand good: for otherwise the most innocent and most deserving subject would be unavoidably exposed to numberless prosecutions for doing their duties, without any colour of fault. I put this case; would the Court of Quarter Sessions of this county, suffer the constitutionality of the law establishing the District Court to be enquired into, on an indictment for perjury, committed in a cause tried before the District Court?

The distinction is between oaths taken before persons merely acting in a private capacity, and those who take upon them to administer oaths of a public nature, without legal authority, or colour of authority. Wherever persons who have colour of authority, acting under commissions from the appointing power, but which it may be alleged have been forfeited by some act which may perhaps be of an equivocal nature, in all such cases the validity of the commissions cannot be examined in a suit in which they are not a party. The regular, and indeed the only mode is by information. If a person usurps an authority to which he has no title nor colour of title, that would present a different case; for every act of such a person would be simply void. But the law pays such respect to those who are clothed with even colourable title, as not to permit the title to be examined except in a mode in which they are parties, and before the proper tribunal, the Supreme Court, in whom by act of Assembly, all the authority of the Court of the King's Bench is vested.

The plaintiff in error further objects to the admission of the following question and answer, in the deposition. Question, by

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defendant—"Did Captain M'Kim tell you that he had received one hundred dollars of me, in Wilmington and Brandywine money?" Answer—"Yes." This was opposed on the ground that it was a leading question. The court overruled the objection, and of this the plaintiffs in error also complain. At common law, depositions were not received in evidence, and if received at all, it was with great caution. It was thought, and justly too, that *viva voce* testimony was much better than depositions. But experience has taught us, as commercial transactions multiplied, and commerce extended, that the use of depositions tends to expedite causes, and indeed is indispensable in the administration of justice. Hence in modern times, they are guarded, but not put under unnecessary restraints. In *Shaler v. Spear*, 3 Bin, 130, it was decided that a leading interrogatory put to a witness, should be objected to at the time it was put; it cannot be objected to on that ground alone at the trial. And in *Strickler v. Tod*, 10 Serg. & Rawle, 70, the same principle was recognized. It is said, and perhaps truly, that both parties appeared at the taking of the deposition, though this does not appear in *Strickler v. Tod*. And in neither case is the decision put upon that ground. Although M'Kim was not actually present at the time the question was asked, yet he might have been present. Instead of attending to the taking of the deposition, he enters a protest against taking it at all, without stating his reasons; and therefore, (not because he had no notice,) it was taken in his absence. When a party has an opportunity of being present, and does not choose to avail himself of it, he shall not afterwards be permitted to make formal objections against it. Depositions are frequently taken by the parties themselves, without the aid of counsel, and are generally very inartificially drawn. If we were to listen to captious objections, it would impair the utility of such proof, particularly in case of death. When a party attends, and objects to the form of the question, then if the opposite party persists, he does so at his peril. This is giving suitors every advantage which policy requires, and I am not for extending the privilege any further.

Judgment affirmed.

HENRY DIETRICH *against* MICHAEL DIETRICH, and ANDREW YUNDT.

## IN ERROR.

A deposition taken in the Register's Court, upon hearing of any cause litigated in that court, but not decided, is not evidence upon the trial of an issue between the same parties, directed by that court, without proof that the deponent is dead, out of the jurisdiction of the court, or unable to attend.

*Query.* Whether the decision of the trying court upon the preliminary proof of the inability of the witness to attend is the subject of error?

*Query.* Upon an issue *devisavit vel non*, are the declarations of a devisee, who is a party to the issue, evidence, where there are other devisees or legatees not parties?

WRIT of error to the Court of Common Pleas of the county of Lancaster.

This was an issue of *devisavit vel non* on an instrument of writing, purporting to be the last will and testament of *Philip Dietrich*, deceased.

That paper contained a devise of one tract of land to *Henry Dietrich*, and another to his sons *Adam* and *Samuel*, charged with legacies which were bequeathed to the testator's son *Michael*, and his two daughters, *Barbara*, wife of *Andrew Yundt*, and *Christiana*, wife of *Jacob Shaeffer*.

*Henry Dietrich* and *Christian Herr* were appointed executors, and the paper was witnessed by *Michael Rudicil*, *John Kurtz*, and *Philip Gloninger*. It was not received to probate, but on the caveats of *Michael Dietrich* and *Andrew Yundt*, this issue was directed on the 19th of October, 1816. The case had been tried several times before, and is reported in 5 *Serg. & Rawle*, 207.

On the present trial, the following bills of exception were taken on the part of the plaintiff, who, the verdict and judgment being against him, brought this writ of error.

First bill of exception.—After eleven of the jurors for the purpose of trying this cause had been called, and were in the box, an application was made by the plaintiff for its continuance; upon which application *Henry Dietrich*, the plaintiff being duly sworn according to law, among other things, testified that he had not subpoenaed Mr. *Gloninger*, but that he went last week to Mr. *Gloninger's* house with a subpoena in his pocket for Mr. *Gloninger*, (which he now produces, *prout* the same.) He told Mr. *Gloninger* he had a subpoena in his pocket for him to attend on Monday last, and had come to subpoena him. Mr. *Gloninger* replied that it was not worth while for him to do so, he could not attend; his deposition had been taken, and they must be satisfied with that. After plaintiff had given all his testimony on the motion to continue, the

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defendants called *Adam Metzgar*, a witness who testified, that he had this morning signed his name as a witness to the will of *Philip Gloninger*, that Mr. *Gloninger* sent for him, and that he thought him very well, better than he had been. Whereupon, the court decided, that they would not continue the said cause. The cause being at issue, the jury were then sworn according to law, and the plaintiff to maintain the issue on his part, offered in evidence the deposition of *Philip Gloninger*, taken before the Register's Court of the county of Lancaster, in the cause in which this issue is directed, on the 19th October, 1816.

The plaintiff then called Dr. *John Miller*, as a witness; who, being duly sworn according to law, testified as follows: "*Philip Gloninger* might be able to come to court, but I don't believe he would be able to go through all the testimony in his present situation. He has got an asthmatical affection of his breast; on account of which he cannot rest at night, and has not rested any for several weeks. He has also had a slight bilious affection last week; that, together with his former complaint has weakened his mind considerably, from which he has become a little nervous, and would be unable to attend an examination. An examination might excite his vascular system, and it might bring on either slight apoplexy or a state of syncope, as I have seen him once or twice." Question, "Would, or would not an examination be dangerous to his life?" "In this way it might be considered so. I saw him last, between nine and ten o'clock this morning, I saw him before that yesterday in the forenoon. I consider him rather better to-day. I have had no conversation with him respecting wills—but he seemed very anxious, and told me he wished to be better, he had about half a dozen lines to write respecting his own family, and he would be satisfied. He told me he was seventy-four years of age." Question, "How long has he been in his present situation?" "The chief part of this summer, affected with the asthmatical affection." Question, "Would not the gentlemen have been enabled to take his deposition at any time during the present summer?" "I don't doubt but they might." Question, "Might it not have been taken a month ago?" "I have not paid such attention as to the time, to say how he was a month ago: I expect it might have been taken, with safety, six weeks ago. I know nothing of his making his will this morning, except what I heard in court, I have never known of a person having syncope from asthma in court—no, nor reading of one. His vascular system is very much excited at present; and there is a probability of its happening from the predisposition of the system. His pulse is always full and strong—I believe it is very rare that apoplexy has been occasioned by asthma. His strong pulse is occasioned by a spasmodic affection of the lungs. He commonly passes the day tolerably easy, but at night rests none, except sitting



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up, and never rests an hour at a time. It is possible he might answer half a dozen questions here, and possibly not. No one can tell what effect it might have. The heated atmosphere here would be very exhausting to him—to stand such an examination and cross-examination for two hours would raise his pulse. He is a choleric man; and I would suppose it would have the effect of operating on his brain.”

The plaintiff offered his deposition in the Register's Court, and the minutes of the Register's Court.

The defendants then called *John Getz* as a witness, who being duly sworn according to law, testified as follows: “It was between 9 and 10 o'clock this morning I saw *Philip Gloninger*, and I think his state of mind was as good as ever, only that he was very weak. In his writing room or office I saw him, he was sitting on the chair. I saw him looking over his will, and he altered some of the writing; rectified it. I and Mr. *Diffenbaugh* and Mr. *Adam Metzgar* were the witnesses to his will. He executed the will before us. He would be able at home, I suppose, to give testimony; since this morning I have not seen him—he would have been this morning.”

Question, “What is the nature of his complaint?” “Dr. *Miller* can tell. I have seen him so that he could not rest five minutes on account of his breath; and he said he got giddy in his head, and he said he was so very weak. If he would be as he was a couple of days ago, he could not have been examined and cross-examined for two hours. This morning between nine and ten o'clock, may be he could have stood it a quarter of an hour or so, but how much longer I could not say.” Question, “What would be the effect of bringing him here and examining him two hours?” “I can't say.” Question, “Could he stand at all?” “I hardly think he could: I have seen him some days when he could not.” Question, “Don't you think it would be a great danger to his health.” “It might be a danger to his health.” Question, “How long was he occupied in looking over his will?” “Not long—asked me to call Mr. *Diffenbaugh*—it might be between ten and fifteen minutes; he looked over it, and took his knife and scratched a little, and then said it was right. I don't take it that he is getting better: he says he is not: said he could not rest at night, nor had not for some nights. I have not seen him out of his house for near three weeks; he did not speak so much; he was sitting, and fell asleep, and did not hear some words I think—he has been in the habit of falling asleep for some years; that is when he set long—he has a spring machine to put behind him in bed, borrowed of Mrs. *Yeates*; I mended it.”

*Porter* read the record of this suit, by which it appears, that on the former trials, Mr. *Gloninger* was the first witness examined by the plaintiff.

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The counsel of the defendants then objected to the admission of the said deposition of *Philip Gloninger*, taken before the said Register's court, in evidence; and after argument, the court sustained their objection, and overruled the same: to which opinion of the court the counsel for the plaintiff did except, and pray the court to seal this their bill of exceptions, which is done accordingly.

Second bill of exceptions.—The counsel for the plaintiff, after the foregoing bill of exceptions was sealed, offered to prove as follows:

"The plaintiff to maintain the issue on his part, offered in evidence the *caveat* of *Michael Dietrich* and *Andrew Yundt*, against the probate of the instrument of writing now on trial; the proceedings of the Register's court thereupon, previous to the direction of the issue, [and to prove that *Philip Gloninger*, the person who drew the said instrument of writing, and who is a subscribing witness thereto, although regularly *subpenaed*, cannot attend on account of bodily and mental infirmity; that both his body and mind are so diseased and impaired, that he cannot now be examined as a witness, either at his own house or in court, nor could he have been for the last three weeks,] and we offer in evidence the deposition of *Philip Gloninger*, taken before the Register's Court on the 19th October, *prout* the same."

To this testimony, the counsel for the defendants made the following objection in writing: "The counsel for the defendants object to so much of the said offer as would permit the giving in evidence of the depositions, or any of them, taken in the Register's Court."

The counsel for the plaintiff then read in evidence the *caveat* of *Michael Dietrich*, dated 16th September, 1816, and the *caveat* of *Andrew Yundt*, dated 17th September, 1816, and the record in the Register's court in the cause in which this issue is directed, dated 19th October, 1816.

The counsel for the defendant then stated that they did not object to so much of the said offer as is included in brackets; but that they did object to the remaining part of the offer, to wit: the part of it which follows the brackets.

The part within brackets not objected to, and therefore allowed by the court, but at the same time the court overruled the said deposition of *Philip Gloninger*, taken before the Register's Court, on the 19th October, 1816. To which opinion of the court, overruling the said deposition, the counsel for the plaintiff did except, and pray the court to seal this bill of exceptions, which is done accordingly.

Third bill of exceptions.—The cause being at issue and the jury sworn, *prout* the record, the plaintiff, to maintain the issue on his part, gave in evidence, amongst other things, the instrument of writing purporting to be the last will and testament of *Philip Die-*

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*trich*, deceased, the validity of which is on trial in the present cause, bearing date the thirteenth day of April, one thousand eight hundred and sixteen.

After the plaintiffs had rested, the defendants, among other things having read the deposition of *Elizabeth Lechler*, to maintain the issue on their part, offered in evidence the deposition of *Lydia Curran*, taken before *Samuel Carpenter*, Esquire, the 13th day of March, 1820, and filed of record in this cause.

The plaintiff objected to that part of said deposition, a copy of which follows:

"I also lived at *Henry Dietrich's* a little better than two months: when he would come home, his wife would ask him 'how is the old man?'—he would say, 'he is childish and childisher every day.'"

The court overruled the said objection of the plaintiff's counsel, and admitted the said part of the deposition to be read; to which opinion of the court the counsel for the plaintiff did except, and pray the court to seal this their bill of exceptions, which is done accordingly.

Fourth bill of exceptions. The cause being at issue, and the jury sworn, *prout* the record, the plaintiff after having given in evidence, among other things, the instrument of writing purporting to be the last will and testament of *Philip Dietrich*, deceased, dated 30th April, 1816, rested. The defendants to maintain the issue on their part, offered in evidence the deposition of *James Lowe*. The plaintiff objected to that part of the said deposition which follows, to wit: This deponent further heard *Henry Dietrich*, the plaintiff in this suit, say to this deponent that the said *Philip Dietrich* was childish and doted; this was about two years ago, as near as this deponent can recollect, he knows that it was about that time, as it was just before the election in the fall of the year 1815, that this deponent moved away from where he lived near the said *Philip Dietrich's*, and what he has above deposed to, happened during the said year.

The court overruled the said objection of the plaintiff, and permitted that part of the said deposition to be read, to which opinion of the court the counsel for the plaintiff did except, and pray the court to seal this bill of exceptions, which is done accordingly.

Fifth bill of exceptions. The cause being at issue, and the jury sworn, *prout* the record, the plaintiff having examined *John Kortz*, one of the subscribing witnesses to the alleged last will and testament of *Philip Dietrich*, deceased, and given in evidence the deposition of *Michael Rudisill*, gave the said will in evidence and rested. The defendants then gave their testimony in chief to the jury; and, among other things, examined several witnesses, who testified to the general good character of *Elizabeth Dietrich*, the wife of *Michael Dietrich*, one of the defendants. The plaintiff then proceeded to give his repelling testimony in evidence, and among other things proved by *John Landis*, that *Elizabeth Russell*, a witness who had

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been examined in behalf of the defendants, in the year 1817, or 1818, at his house said, that *Michael Dietrich, jr.* the son of one of the defendants, was at her; they wanted her to give such evidence as they wanted; that they promised her some furniture if she would do so, but she said she was not going to do it. She said the old man had his senses to the last hour; she said she would not take a false oath for *Michael Dietrich*, or any body else. The plaintiff also proved by *Elizabeth Dietrich*, that the said *Elizabeth Russell*, had told her that the said *Michael Dietrich, jr.* (who had also been examined as a witness in behalf of the defendants,) had been at their house, and had wanted her to swear on their side, and had promised her a table and a half a dozen chairs, and half a dozen cups and saucers and plates, to do so. The plaintiff then afterwards examined *Margaret Flick* as a witness, who testified as follows: *Mrs. Dietrich*, (the wife of *Michael Dietrich* the defendant) told me to tell *Betsey Russell* to come in; she had a house-tire for her. It was some time after the old man's death. *Betsey Russell* came in one Sunday afternoon. *Mrs. Dietrich* sent word down by *Rebecca Dietrich*, her daughter, for me and *Betsey Russell* to come up. I told her I did not like to go up, and she went home. She came back directly again, and told us we must come up. I told her then again, I did not like to go up. She told me then, we should come up—we could go in the back way—that she had a key to the garden gate. Then *Rebecca* did not go till we went along. *Mrs. Dietrich* asked me what was the reason why we did not come? I don't recollect what I said. She told *Betsey Russell* then, she had some cups and saucers for her; half a dozen of china, and half a dozen of plates, two butter plates and a cream jug. She told me then we should take them along: I told her then I did not like to take them along because it was Sunday. Then I told her I would go out to *Adam's* on Monday morning—I was working there then, and would take them along to *Betsey Russell*. On Monday morning I went up to *Michael Dietrich's* with a basket, to take the cups and saucers and plates to *Betsey Russell*. *Mrs. Dietrich* put them in the basket for me, and told me to tell *Betsey Russell*, that if *Adam Dietrich's* family did not use her well, she should come in and live with them, that she would give her house room, and charge her no house rent. When I came out to the house, I told *Betsey Russell* this: She told me then, that she knew very well what they wanted. She told me then, she would not go there at all; they were going to take her in to go on their side."

The plaintiff then, further, to maintain the issue on his part, offered to prove by the said *Margaret Flick*, that the said *Elizabeth Dietrich*, (the wife of *Michael Dietrich*,) attempted to bribe her, the said witness to swear that old *Philip Dietrich* was out of his senses. The counsel for the defendant objected to the admission of the said testimony; and the court, after argument, sustained their objection

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and overruled the same: to which opinion of the court, the counsel for the plaintiff did then and there except, and pray the court to seal this bill of exceptions—which is done accordingly.

The plaintiffs in error assigned the following errors:

1. There is error in the first and second bills of exception; inasmuch as the court ought to have permitted the deposition of *Philip Gloninger*, taken before the Register's Court, to be read in evidence to the jury.

2. There is error in the third bill of exceptions, inasmuch as the court permitted that part of the deposition of *Lydia Curran*, which was objected to by the counsel of the plaintiff, to be read in evidence.

3. The court erred in permitting that part of the deposition of *James Lowe*, to be read in evidence, which was objected to by the counsel for the plaintiff, and which is the subject of the fourth bill of exceptions.

4. The court erred in refusing to permit *Margaret Flick*, under the circumstances stated in the fifth bill of exceptions, to testify, that *Elizabeth Dietrich*, the wife of *Michael Dietrich*, attempted to bribe her to swear that old *Philip Dietrich* was out of his senses: and therefore, there is error in the fifth bill of exceptions.

*Buchanan* for the plaintiff in error.

First error. The depositions of the subscribing witnesses to the will were reduced to writing by the Register's Court, under the act of assembly of the 13th April, 1791. *Purd. Dig.* 703, the 18th section of which requires that the depositions of the several witnesses examined before that court, shall be taken in writing, and made part of the proceedings in the cause, and makes these depositions evidence upon an appeal.

They are part of the record, and taken with more care than could be had under any other circumstances; and in the present case they were taken upon a full cross examination. *Philip Gloninger*, the witness, whose deposition the plaintiffs offered, was a man of 74 years of age, *in extremis*, and his inability to attend, established by the testimony of his attending physician; and yet the court rejected his deposition. It could not be on the ground that there had been a failure to prove the inability of the witness to attend, that the deposition was overruled. To that point the proof was full. Nor can it be the law, that the judge who tries the cause, has upon this preliminary question the right to decide conclusively, and without review. The syllabus which states this principle is not supported by the case. *Voris v. Smith*, 13 *Serg. & Rawle*, 334. It must be a clear case, we admit, which would justify this court to reverse on this ground. He referred also to *Vincent v. Huff*, 8 *Serg. & Rawle*, 381, 387.

But it is apparent on the second bill of exceptions, that the deposition was not rejected for any defect of proof on this point

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Upon that bill we offered to prove the absolute inability of the witness to attend.

When an issue is directed by a court of chancery to a court of law, to which this is analogous, it was never heard that a deposition which had been taken in the cause in chancery, and passed publication, could not be read. This deposition is taken in the most solemn form, and by the act of assembly is made part of the record. *Logan v. Watt*, 5 *Serg. & Rawle*, 212. *Dornick v. Reichenbach*, 10 *Serg. & Rawle*, 84. He referred also to the case of *Sholly v. Diller*, decided at Chambersburg, and not yet reported.

Second and third error. The question presented on these bills is whether the declarations of *Henry Dietrich*, one of the devisees, who was a party to the issue, can be received in evidence to effect the interest of the other devisees. He contended they could not. It was so decided by the Supreme Court of the state of Massachusetts, in the case of *Phelps v. Hartwell*, 1 *Mass. Rep.* 71; and the same principle is recognized in the case of *Bovard v. Wallace*, 4 *Serg. & Rawle*, 499, and the very point is decided in *Nussear v. Arnold*, 13 *Serg. & Rawle*, 323. *Nussear* was a nominal party, being the agent of the party in interest, and the declarations offered were those of the real party whose agent he was. The court placed the decision of that case on the true ground, that the declarations of one devisee shall not be received to destroy the interest of others. *Fenn v. Read*, 1 *Yeates*, 87. The furthest courts have gone upon this subject, is to admit the declarations of a trustee, party on record, to effect the *cestui que trust*. 2 *Starkie's Ev.* 39, 40, 41. But the declarations of an executor before he became such are not evidence. 4 *Con. Rep.* 544. These declarations of *Henry Dietrich*, were made in the life time of the testator.

Fourth error. The wife of the defendant was active in corrupting the witness of the plaintiff, she united with him in a conspiracy to effect this object, and proof should been received of her attempt to bribe the witness.

*Porter* for defendant in error. There is no question but that evidence may be given of what a witness swore on a former trial between the same parties, if he be dead, or reside out of the state. *Magil v. Cauffman*, 4 *Serg. & Rawle*, 319. *Lightner v. Wike*, *Id.* 203. *Carpenter v. Groff*, 5 *Serg. & Rawle*, 162. *Chess v. Chess*, 17 *Serg. & Rawle*, 409. Admit, for the sake of argument, that a deposition taken before the Register's Court is upon the same footing, still the plaintiff did not bring himself within the rule. *Ottinger v. Ottinger*, 17 *Serg. & Rawle*, 142.

This rule has not been extended to a witness residing within the jurisdiction of the court, however infirm he may be, *Richardson v. Stewart*, 2 *Serg. & Rawle*, 84. So no person can be admitted to prove a deed, until it appear that the subscribing witnesses are dead, or not to be had. *Peters v. Condron*, 2 *Serg. & Rawle*, 80.

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Here the issue had been pending for eight years, during which the party might have taken the deposition of the witness, and he should have taken it.

The court below decided, that the evidence of the inability of the witness to attend was insufficient, and this was the ground on which the deposition was rejected. Their preliminary inquiry, he contended, was exclusively for the trying court, and was not the subject of error. *Vincent v. Huff*, 8 *Serg. & Rawle*, 311-7. *Voris v. Smith*, 18 *Serg. & Rawle*, 334. *Harwood v. Ramsey*, 15 *Serg. & Rawle*, 32. *Dodge v. Peifer*, 16 *Serg. & Rawle*, 214.

The court below have the witnesses who prove the preliminary matters before them, and can best judge of the degree of credit to be attached to their testimony. So where a trying court have had some evidence of a paper having been lost, the admission of secondary evidence of its contents will not be error, nor will a court of error inquire into the preliminary evidence. *Leazure v. Hillegas*, 7 *Serg. Rawle*, 323.

Second and third Error. *Henry Dietrich* was the party in the cause, and this circumstance distinguishes this case from all the cases relied on on the other side. In *Lightner v. Wike*, 4 *Serg. & Rawle*, 203, and *Bovard v. Wallace*, 4 *Serg. & Rawle*, 499, the declarations were decided not to be evidence, because not made by the party to the suit.

The same remark applies to the case of *Nussear v. Arnold*, 13 *Serg. & Rawle*, 323. It was expressly put upon this ground by the counsel who argued the case, and any general remark made by Chief Justice *Tilghman*, in delivering the opinion of the court, applicable to the case of the declarations of a party to the suit, who is devisee under the will, is a mere *obiter dictum*. So an admission contained in the recital of a deed by one of the lessors of the plaintiff, is evidence against all, as he could not be called as a witness, and there is a community of interest among them. *Brandt v. Klein*, 17 *Johns. Rep.* 335. So a declaration or confession of one of the lessors of the plaintiff in ejectment is evidence against all of them. *Jackson v. M'Vey*, 18 *Johns. Rep.* 330.

If the declarations of the party on record are not evidence, then no evidence can in any shape be obtained as to his knowledge, for he cannot be called as a witness. But the confessions and admissions of a party on the record are always evidence, and that too although he be but a trustee. 2 *Starkie Ev.* 39, or whether they are made by a real or a nominal party, who sues for the benefit of another. 1 *Phil. Ev.* [74.] *Banerman v. Radenus*, 7 *T. R.* 663. *Johnson v. Kerr*, 1 *Serg. & Rawle*, 25. *Marshal v. Sheridan*, 10 *Serg. & Rawle*, 268. So in a civil suit against several, who have a joint interest in the decision, a declaration by one, concerning a material fact within his knowledge, is evidence against him, and

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all who are parties with him to the suit. 1 *Phil. Ev.* [75.] *Johnson v. Beardslee*, 15 *Johns. Rep.* 3.

Declarations of a joint debtor, although not a party to the suit, may be given in evidence. 3 *Day's Rep.* 309. But here we not only alleged incapacity of the testator, but a conspiracy, practices and fraudulent misrepresentations, on the part of the principal devisees, and the evidence to support these allegations had been given before the offer of the declarations of the plaintiff. On this ground these declarations were clearly evidence.

Fourth error. The evidence offered in this bill was rather inference from facts, than the evidence of facts. *Miller v. Miller*, 3 *Serg. & Rawle*, 267. The declarations of the wife are never evidence against her husband even where she is the meritorious cause of action. 1 *Phil. Ev.* 64. *Wharton*, 308, Pl. 439. *Randal's Peake*, 17. 2 *Stark. Ev.* 707, note 2. *Cro. Eliz.* 245. 1 *Esp. N. P.* 413.

*Jenkins*, on the same side. The cases referred to of *Ferron v. Read*, *Logan v. Watt*. *Dorrick v. Reichenback* and *Sholly v. Diller*, are all cases where the writing was either proved before the Register, Register's Court, or upon an issue directed for that purpose. In any such case, the probate is unquestionably *prima facie* evidence to go to the jury, but here the proceeding was arrested in *limine*; and a decree of probate never was made; and the depositions by the act of assembly only become evidence in the event of a decree. By that act either party may ask an issue; and if that be directed, it must be conducted according to the principles of the common law. And they might as well have offered the paper, alleged to be a will, in evidence, as to offer this deposition, without the preliminary proof. This issue is not according to the act of assembly which makes the depositions evidence on appeal, but is under the proviso or exception to the act, which authorises an issue, and sends the cause to a different *forum*.

It is important to adhere to the general common law rule, which requires the personal presence and examination of the witness before the court; *Gilbert Ev.* 54, and the party who wishes to avail himself of an exception to that rule, should be required to bring himself clearly within the exception. If the court will review the evidence on the preliminary question as to the ability of the witness to attend, it must be in a rank case. This is a wholesome principle and leads to justice; and this is not such a case. By reference to the evidence, the court will see, that the plaintiff did not make out the inability of the witness to attend.

Where counsel take the opinion of the court on a question of blendid law and fact, error in that opinion is not assignable here. *Rouvert v. Patton*, 12 *Serg. & Rawle*, 253. Upon this principle, if



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the court below did err on this point, this court will not reverse on that account.

Depositions are the creatures of the civil law, and the proceeding upon appeal, under this act of assembly, is in the nature of a civil law proceeding. At common law they are but substitutes for what is considered better evidence, and not to be introduced but upon evidence clearly establishing the exception which warrants their admission.

We proved that the decedent was an infirm, imbecile old man, and that he had been practised upon by the plaintiff, his son, for his own aggrandizement, and to the ruin of his brothers and sisters. He is not only a party on the record, and a principal devisee, but a devisee deeply implicated in a fraud in obtaining the will. If the principle be established, excluding the declarations and acts of a devisee under these circumstances, the grossest fraud may be protected from examination; legacies may be inserted in the will, and the devisee, who contrived and executed the fraud, become a party to the issue; and all his acts and declarations which go to demonstrate that fraud, are shut out, and no evidence can be given of them.

The rule admitting the declarations of the party does not apply to the case of a mere trustee; but where the party has an interest, his declarations are always evidence. This principle pervades all the cases, and the excepted cases are of parties having no shadow of interest, as guardians, executors, or mere trustees.

*Hopkins*, in reply. The questions presented are of peculiar importance. Wills are commonly made by old men, and their associates, who are usually old men, are the witnesses, and if their testimony, is not perpetuated, disastrous consequences result. The act of assembly has therefore wisely provided to perpetuate that testimony. There are two modes of proving a will in common form, and in solemn form. In common form, it is proved by the oaths of the subscribing witnesses, which is the most ordinary mode in Pennsylvania. This proof is *ex parte* and informal, yet to perpetuate acts so important, the depositions taken in this way, are permitted to be read. This is the principle in the cases already referred to in 1 *Yeates*, 87. 5 *Serg. & Rawle*, 212. 10 *Serg. & Rawle*, 94, and in 4 *Yeates*, 13, and the case of *Sholly v. Diller*. The officer usually has no practice in taking depositions, and commonly generalizes, and throws into the lump the testimony of the witnesses; and yet these depositions, thus informally taken, contrary to all common law rules in reference to testimony, are made evidence. But the Register's Court is held by men fully competent to the investigation, and proceeds not *ex parte*, but in the presence of the parties litigant. Under the act of assembly, all the proceedings of this court, and before the Register, up to the time of granting the issue, including the depositions taken, are a matter of record, and

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may be read, although the witnesses are actually present in court. This court is solemnly constituted, and this proof is formally taken, and in solemn form, and much higher testimony than the *ex parte* probate which has been decided to be competent evidence. No evidence therefore was necessary to introduce the depositions. By the act of assembly they are made part of the proceedings, and in one event they are the only evidence upon which the highest court, in the last resort, are to decide. The legislature meant that the testimony should be taken, and fixed; and whether in common form, or in solemn form, it is evidence. Many a will has fallen to destruction for want of this care to preserve the testimony. These depositions are not only taken in solemn form, but when the recollection of the witnesses is fresh, and alive to the transaction, which has then but recently occurred. In the lapse of time, the mind of the witness is agitated by the events of life, and his memory of the incidents connected with the execution of the will almost effaced. If the party were required again to take his deposition, before a justice, an old man would be liable to have his recollection played with, by the ingenuity of counsel, and his testimony perverted. Depositions usually partake of the infirmity of the *forum* before which they are taken. But before the Register's Court, the witness is protected by a court accustomed to manage and control the taking of testimony.

Knowing the importance of the deposition of *Gloninger*, (who wrote the will,) we gave the preliminary evidence of his inability to attend. It is true it was agreed that our offer on this point in the second bill should be received, but at the same time the court overruled the deposition; showing, that the court considered that no testimony could be given which would warrant the introduction of the deposition. But it is denied that a discretion exists in the court below to reject evidence, which is not controlled here.

The court below is called to make a hasty decision, and it would be monstrous to say, that there is no review of such decision rejecting evidence on the preliminary inquiry.

In the case of *Pipher v. Lodge*, 16 *Serg. & Rawle*, 220-21, the chief justice expressly affirms the position that such decision is the subject of review. Every question is for the discretion of the court, but it does not follow that the exercise of that discretion is conclusive. *Harwood v. Ramsey*, 15 *Serg. & Rawle*, 32.

This is not the case of a contract in which all the parties bind themselves, so that the act of one is the act of all, but it is a case in which, although the legatees and devisees have a community of interest in establishing the will, they, as respects each other, are strangers.

The case in 1 *Mass. Rep.* 71, is directly to this point, and has not been impaired. So is *Bovard v. Wallace*, and *Nussear v. Arnold*. In the last case the ground taken here was considered. It was al-

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leged that *Margaret King*, whose declarations were offered, was not only the principal devisee, whose agent the nominal party on the record was, but deeply implicated in a conspiracy, and fraud in obtaining the will.

If there are two trustees, and both sue, the declarations of one are not evidence. There is no privity of contract between them; where this privity exists, as in the case of a joint contract, it is otherwise. This distinction explains the cases referred to in 17 *Johns. Rep.* 335, and 18 *Johns. Rep.* 330; the parties were united in interest, and the declarations of one were received to effect the others.

GIBSON, C. J. delivered the opinion of SMITH, J. and himself, while HUSTON, J. delivered the opinion of ROSS, J. and himself.

GIBSON, C. J.—I have so often been accused of an attachment to common law principles and forms in preference to local practice, that it gives me pleasure to testify, in this instance, a paramount respect for our own precedents. This court had flattered itself that the law was settled by *Bovard v. Wallace*, and *Nussear v. Arnold*, (which is this very case,) if not in conformity to common law analogies, at least consistently with justice and reason; and even were my opinion of the fitness of those decisions changed, I would, to avoid the mischiefs which are inevitably produced by overturning the solemn decisions of the court of the last resort, for theoretic reasons, adhere to the known landmarks of the law by which courts and counsel may proceed with safety and certainty. I am happy to say my brother SMITH concurs with me in opinion, that the admissions of *Henry Dietrich*, a principal devisee, and party to the feigned issue, were erroneously received; and, the court being equally divided on this point, the authority of the cases to which I have referred, is, as yet, untouched. On the remaining point, I would, for the sake of unanimity, be inclined to yield the opinion I expressed in *Pipher v. Lodge*, 16 *Serg. & Rawle*, 214, as the authorities are nearly balanced on the question, whether the sufficiency of evidence to lay a ground for the introduction of a deposition, can be re-examined on a writ of error; but as Judge SMITH holds out on this point also, I am inclined to say the judgment ought to be reversed on both points.

HUSTON, J.—The two first bills of exception were in this court argued together, but an attempt was made to draw a distinction between them, by reading the part within brackets, without the words "*to prove*," and considering the rest of the sentence as a statement of facts admitted, and by using the words, "but at the same time the court overruled the said deposition," as conveying the idea that although the court allowed them in words to prove the allegation in brackets, yet in fact, they decided without hearing such facts proved; beyond a doubt the deposition was offered the second time for the purpose of accompanying it with the record of the issue in which it was taken:—because to enable

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one to read a deposition, taken in a former cause, or in another court, between the same parties, you must show that there was such a cause in such court: so the court understood it. There was no offer to give further evidence of inability to attend. If offered and refused we should have heard of it. To consider a bill of exceptions, on account of some inaccuracy of expression, as presenting a case so different from the real facts, as that counsel will not even assert events to have happened as they now allege them, would be to pervert a bill of exceptions to the worst purpose. Was this deposition evidence, if the witness was standing in court, and if not, was the proof of inability to attend such as that it was error in the court below to reject it?

In the first view, the principal part of the argument was founded on reading the first sentence of the act of assembly as far as the words "made part of the proceedings in the case:" and to be sure, if no other words had followed, the argument was strong. The act contemplates two classes of cases, one where on *caveat*, the whole matter is heard and decided by the Register's Court, without the intervention of a jury, and here all the testimony must be reduced to writing, and forms part of the proceedings, and if an appeal be taken, goes up as part of the cause.

The other class is where the weight and effect of the evidence is not submitted to the Register's Court, but to a jury; and as there the mode of proceeding is by examination of witnesses, in presence of the jury, and their finding is conclusive on the facts submitted, the testimony given before them, does not go up on appeal, nor is it known to the superior court. Suppose the testimony of the witnesses to the will is reduced to writing in the Register's Court, and from this testimony it would appear to be a valid will, yet an issue is directed, and on the whole evidence the jury find it is not the will of the testator; those depositions are not within the words of the act of assembly, and if sent up on an appeal, must be considered as no part of the record, or an immaterial part.

In ordinary cases the witnesses go before the Register, and make oath, that they saw the testator execute and deliver the paper as his last will and testament, and that he was of sound mind. These affidavits are endorsed on the will, and letters testamentary are granted to the executors. In giving copies of the will, it was usual, and at one time was thought necessary, to give copies of these affidavits. It was, however, long ago decided that a copy of the will, and a copy of the record, that it was on such day proved and approved, was sufficient. This certificate of the proof, and that it was approved, is the real and true probate, and what makes it evidence in any, and every court. If the affidavits of the witnesses are added, along with this certificate, they are often called the probate, and read along with it, though the witnesses are standing in the court, where the will is offered in evidence; and in

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all the cases where such affidavits have been read, it will be found that the Register or Register's Court have acted on them, and adjudged the will to be proved. Where these depositions have not been acted on, and no adjudication on the validity of the will, they may be used as any other deposition taken before a court having jurisdiction of the same matter afterwards trying in another court: that is, may be used, if the deponent is dead, out of the jurisdiction of the court, or unable to attend. It appears Mr. *Gloninger* had been twice examined in open court, on trials of this cause, before the same judges who rejected this deposition. In most cases in this state, and in all of much importance, the counsel on each side, and the court, write what the witness says, and all that he says, (for he stops at the end of each sentence until it is written,) we cannot suppose these, depositions I may call them, were lost. They were not offered to be given in evidence. The president, and perhaps both the judges, knew Mr. *Gloninger*, and the witnesses who swore to his state of health. They had also witnessed his former examinations, and cross examinations in court, and they could, although we cannot judge of the importance of his being examined in the presence of the jury. I cannot allow that a particular temperament of body in the witness, unless very peculiar indeed, can change the law. If a witness intends to tell, and does tell the truth fairly, there is no reason why he should become much excited, or why his choler should rise so as to endanger apoplexy; and if he will become excited in a particular cause, and will answer so as to make a tedious cross examination necessary, it is right the jury should see and hear him. There are two cases, and I recollect but two, where this court have reversed, because the court below erred in receiving or admitting a deposition, on account of a defect of proof of inability to attend; one was a very early case; and there are seven or eight, where it has been said to be a matter pretty much depending on the discretion of the court, who try the cause. The question whether such proof has been given of inability to procure a written paper, in order to let in parol evidence of its contents, is like this in principle; I recollect two cases, *Magil v. Causman*, and another, both reported, in which this court refused to reverse, or even seriously consider the matter, saying it was within the jurisdiction, and depended on the discretion of the court below. This court does not now say, that there can be no case in which we will reverse on such account, but we say it must be a very strong and gross case, in which we will interfere, and we think this not such a case.

The next two bills of exceptions were argued together, and they present the question, whether, in such an issue, the declarations or admissions of the principal devisee in the alleged will, and who is sole plaintiff in the cause, can be given in evidence? Perhaps the decisions of this court, on this point, have been peculiar to this state,

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except one early case in Massachusetts. They seem, however, carefully, either to keep clear of this case or admit it. *Bovard v. Wallace*, 4 Serg. & Rawle, 499. In questions on the validity of a will, the declarations of an executor or devisee, who is not a party to the suit, are not evidence.

The case of *Nussear v. Arnold*, 13 Serg. & Rawle, 323, is still stronger. The question there was, whether the declarations of a devisee, who was carrying on the cause, and whose agent was the plaintiff, in the feigned issue, should be given in evidence. And in the argument and decision it seems to be taken for granted, that if the devisee had been a party, there would have been no dispute. The objection that these admissions may effect the rights of other devisees, has not been of so much avail in other courts. In 17 *Johns*. 335, and 18 *Johns*. 330, the recital in a deed, and the parol declarations of one of several lessors in ejectment, were admitted, although they might effect the other lessors.

The admission of sanity or insanity by a devisee is one thing, the repeated admission that a man of ninety years of age was childish, and becoming more so every day, is another and stronger matter, when the fact trying is whether the very person who made this declaration or admission, did not at that very time, or soon after, procure the will to be made by misrepresentation and imposition on this weakness. The cases cited prove the general position, that the declarations of a party on record, and who has an interest in the cause trying, are in all cases evidence. We think therefore, that as well the cases in this court, (which always except the case where devisee is not a party to the suit,) as the uniform current of authorities, require that we affirm the decision of the Common Pleas on these two bills.

The last bill of exceptions was not insisted on. The declarations of a married woman in the presence of her husband, or when acting as his agent, are evidence against him, but generally they are not.

ROGERS, J., had been of counsel in the cause, and took no part.

Judgment affirmed.

**An Appeal by JOHN FEATHER, attorney in fact of JOHN OBLINGER, and of GEORGE FEATHER and SUSANNA his wife, from the decree of the Circuit Court, in the matter of the money paid into the Orphans' Court, arising from the sale of the real estate of CHRISTIAN OBLINGER, deceased.**

The return days of process into the Circuit Court from the Common Pleas, Quarter Sessions or Orphans' Court, by act of Assembly, are the third Monday in *March*, the first Monday in *September*, and the second Monday in *December* in each year.—A *certiorari* is not necessary to remove a record on appeal from the Orphans' Court to the Circuit Court.

Where an appeal is taken from the Orphans' Court to the Circuit Court, the appeal is not required to be filed before the next return day after it is taken, nor can any rule be taken in the case until then: but if the record be filed before the return day, and the cause is heard, and decided by the Circuit Court without objection, it is too late to take that objection in the Supreme Court, after the cause is brought there upon appeal, by a motion to quash.—Generally, if a party goes to trial by consent in a lower court at an earlier term than he was compellable to do, if he make no objection then, his objection will not avail him afterwards.

C. O. made his will in 1798, and died soon after, seized, as he supposed, of a large real estate. By his will, after disposing of his personal estate, he directed that his land should be occupied in a certain manner for three years, then valued by twelve men, and his son *John* have the right to take it at the appraisement; if he refused, the other children in succession to have the right, if none agreed to take it, it was to be sold by the executors, and in either event the money divided among his heirs. "But the sum of £400 is to be charged on the said estate, and remain in the hands of the purchaser:" the interest on this sum he directed to be paid to his wife, and at her death this sum to be divided among his *three eldest children* or their heirs; "and as touching the money arising from my land and estate, I give and bequeath to *my son J. O. first and foremost*, £1000, because he is my only son, along with his share, which he shall have with my other children." His personal estate was exhausted, and his real estate sold on execution within two years after his death; a balance of £400 in 1801 was decreed to be put to interest, and the interest paid the widow. Widow died in 1803, and in 1814 a *scire facias* was issued upon the judgment given to secure the £400 in which a verdict was rendered in 1826, and the proceeds brought into the Orphans' Court for distribution, in 1828: *Held*: That *J. O.* was not entitled to be paid out of this fund, his legacy of £1000; but that he took, as to this, an equal share, as one of the "three oldest children" of the testator, that his interest in the fund was personal, not real estate, and a judgment against him no lien on it.—*J. O.* had taken the benefit of the insolvent laws, in 1800, the assignees then appointed had not qualified, and were dead. *Held*: That the Orphans' Court should retain his fund until the next term of the court in which he was discharged, to have assignees appointed to receive it, but if none were then appointed it should be paid to *J. O.* By the express provision of the insolvent law, the statute of limitations does not run against debts due by an insolvent debtor.

Lapse of time, much greater than that allowed by the statute, may raise the presumption of the payment of such debts; but when the creditor returns no fund but a debt to become due on a future contingency, no presumption of payment would arise before the fund came to hand.

When an appeal is taken from a decree of the Orphans' Court, it would be wrong in that court to order the money to be paid over under that decree, while the recognizance is writing, or the party bringing in his bail.

A motion was made by *Hopkins*, to quash this appeal, on the ground that the cause was not in the Circuit Court when the

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Decree of that court was made. On the 19th April, 1830, the Orphans' Court made their decree in the case from which this appeal was taken, and a *certiorari* issued, tested the 15th day of March, 1830, and returnable the first Monday of September then next; and on the 3d of May, 1830, the Circuit Court, upon argument, affirmed the decree of the Orphans' Court, from which this appeal was taken.

He contended that the cause was not in the Circuit Court before the return day of the *certiorari*; and the decree of that court was therefore without jurisdiction.

*Montgomery* and *Norris*, contra, argued that the writ of *certiorari* was unnecessary: by the appeal the record was removed without it; but as the party had voluntarily appeared before the return day of the writ, and the cause was then heard, he could not now allege want of jurisdiction in the court.

The court overruled the motion to quash, for reasons assigned in the opinion of the court, and ordered the appeal to be argued.

The case was this: *Christian Oblinger*, seized of a large estate, made a will, dated the 8th of December, 1798, by which, after providing that his burial charges and debts should be paid, he directed that his wife should keep in her possession his other estate for her subsistence and use, as she shall find it necessary. That his son, *John Oblinger*, should live in the large house, with his mother, and work the plantation for her. Of what he sowed and gathered in, two-thirds were to be his, and one-third part his mother's. Then, after directing as to cider, fruit, flax, firewood, &c. to be furnished her, he says, such fee or rent shall continue three years; after that, the plantation was to be valued by a jury of twelve men. His son *John* was to have a right to take it according to the valuation: if he did not, another of his heirs was to have that privilege. Three months after the valuation the money was to be paid to his executors, who were to give a deed to the purchaser. If none of the heirs took it, it was to be sold and the money thence arising to be divided among his heirs. But the sum of four hundred pounds, was to be charged on the said estate, and remain in the hands of the purchaser; the interest of which he gave to his wife, "along with the lesser house for her to dwell in, as long as she lived, and all the household and kitchen furniture, to be used at her pleasure." After her death, the four hundred pounds, and what was left of the household and kitchen furniture, were to be divided among his *three eldest children* or their heirs. He then proceeds: "and further touching the money arising out of my land and estate, I give and bequeath to my son, *John Oblinger*, first and foremost, one thousand pounds, because he is my only son, along with his share, which he shall have with my other children." After giving to his son-in-law, *Nicholas Ziller*, one shilling, and to



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his sons-in-law *George Feather* and *Peter Feather*, and the son of *Peter Feather*, the sums received of him, he directs that *Peter Feather's* son, born of his daughter *Mary*, shall have, if he arrived "at the age of twenty-one years, one hundred and fifty pounds, which his executors should retain in the sum of his plantation till he becomes of age." But if he died before the age of twenty-one years, the money should be given to his other three children as a legacy, by his executors, to each fifty pounds. Further, he willed that his eldest daughter, after she had received her share for her and her heirs of his executors, might choose and appoint guardians for her and her heirs; and she should have a right to make use of said sums as need and her circumstances required, and demand it of her guardian. If his wife died before the expiration of the three years mentioned, his executors were to have what there was of the personal property appraised, and do as above mentioned with his plantation: "but always that my son *John Oblinger* may keep my plantation at the appraisement, if he fulfils the said articles and payment." After naming his executors, and revoking and annulling other wills, and dating the will, he added two other items, by which he bequeathed to his grandchild, *Elizabeth Feather*, one complete bed and bedstead, and directed, that after the decease of his wife, she should have the sum of fifty pounds, out of his estate; and then willed and ordered that his daughter *Barbara* should have the sum of fifty pounds, after the decease of his wife; and declared it to be his full meaning and will that she should be considered, and be an heir as one of his four children; but to *Nicholas Ziller* he only bequeathed as above.

After the death of testator, which happened before the 27th December, 1798, his personal estate was exhausted, and his real estate in two years after his death, was sold on executions, and the sum of seven hundred and fifty pounds only remained after the payment of his debts. This being brought into the Orphans' Court, that Court on the 29th September, 1801, decreed the sum of four hundred pounds, bequeathed by the testators will to his widow, to be put out on real security, and the interest thereof to be paid to her during her life, and after her death, that the principal be paid, and distributed to and among the legal representatives of the testator, according to law, and the order of the court.

This sum was loaned to *John Bitzer*, who gave his judgment bond for it: upon which judgment was entered to November term, 1801. On this judgment a *scire facias* issued in 1814, which was transferred from the Common Pleas to the District Court, to June term, 1820, and tried on the 9th September, 1824; and the money now in court was made on that judgment.

The remaining sum of three hundred and fifty pounds was

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divided equally among the children, without regard to the legacy of one thousand pounds to *John*.

The widow died in 1803. *John Oblinger*, *Susanna* intermarried with *George Feather*, and *Barbara* intermarried with *Nicholas Ziller*, were the "three eldest children" of the testator, between whom he directed the four hundred pounds, after the death of his wife, to be divided.

Upon the trial of the *scire facias*, the defendants established the payment of one third of the four hundred pounds, her share, to *Barbara Ziller*, also of fifty pounds to *John Oblinger*, and sixty pounds to *Susanna Feather*, and the verdict was rendered for the balance of two shares. The defendants claimed a credit of fifty-six pounds five shillings, paid on the 1st of June, 1806, to *John Sheaffer*, intermarried with *Elizabeth Feather*, on account of the legacy of fifty pounds bequeathed to her, but the receipt for this payment was overruled, and as to that sum, it was agreed by the counsel of the parties, to leave the question "open for consideration on the final settlement of *Christian Oblinger's* estate."

*Susanna's* share, amounting to the sum of two hundred and eighty-six dollars and fifty-six cents, was paid over to her by Mr. *Buchanan*, the counsel of the plaintiff in the *scire facias*. And the amount paid into the Orphans' Court was the sum of two hundred and ninety-six dollars and seventy-five cents, the payment to *Sheaffer*, with its interest, and the amount of *John's* share being three hundred and forty-five dollars and seventy-six and a half cents, supposing the fifty-six pounds five shillings to have been rightly paid.

The executors of *John Bitzer* claimed to be paid the said sum of two hundred and ninety-six dollars and seventy-five cents, on account of the payment to *Sheaffer*.

*John Oblinger*, by his attorney *John Feather*, claimed to be paid his share, three hundred and forty-five dollars and seventy-six and an half cents; also, the one half of the said sum of two hundred and ninety-six dollars, and seventy-five cents, and *George Feather*, in right of his wife, claimed the other half of that sum.

*David Rinehart* claimed as a judgment and bond creditor, of *John Oblinger*, "who took the benefit of the insolvent laws in the court of Common Pleas of Lancaster county, at August term, 1801," to be paid the whole fund in court.

*David Rinehart's* judgment against *John Oblinger*, was entered on the 20th January, 1800, to November term, 1799. On the 24th September, 1800, on affidavit of the defendant, a rule to show cause why this judgment should not be opened, was taken, and on the 13th February, 1801, a rule to take depositions entered. This proceeding there rested, nothing further having been done upon the rule.

*Rinehart*, also showed a bond given by *John Oblinger* to *Charles*

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*Rinehart*, on the 6th June, 1798, for fifty pounds, assigned on the 2d August, 1800, to him. Also, a judgment in favour of *Michael Berndheisly* against *John Oblinger* and *David Rinehart*, to May term, 1799, on a bond, dated 9th March, 1798, which was paid by the said *David Rinehart*.

*John Oblinger* took the benefit of the insolvent laws, to August term, 1800, in the court of Common Pleas, and executed an assignment in trust for his creditors; the assignees never gave bond, and were dead at the time the decree of the Orphans' Court was entered in this case. *Oblinger*, after taking the benefit of the insolvent laws, removed to the state of Ohio.

Motions, corresponding with these several claims, were entered in the Orphans' Court.

That court denied the motion made on behalf of *Bitzer's* executors, (the payment to *John Sheaffer* being a mispayment,) and the motion in favour of *David Rinehart*, and decreed that the share of *John Oblinger* should be paid to his assignees legally qualified to receive it, and that the fund should be detained until the court of Common Pleas should make an appointment of assignees, and that the one half of the sum of two hundred and ninety-six dollars, and seventy-five cents, the sum reserved to await the question as to the payment to *Sheaffer* by *Bitzer*, should be paid to *George Feather*, in right of his wife, the assignees of *John Oblinger* being entitled to the other half.

From these decrees of the Orphans' Court each party appealed to the Circuit Court, who on the 3d of May, 1830, affirmed the decrees of the Orphans' Court; and from this decree of the Circuit Court, *John Feather*, attorney in fact of *John Oblinger*, and *George Feather*, and *Susanna* his wife, appealed on 7th May, 1830, to the Supreme Court, for the following reasons, viz:

1. Because the court refused to order to be paid out of court to *John Feather*, attorney in fact of *John Oblinger*, the sum of three hundred and forty-five dollars and seventy-six and an half cents; and also the sum of one hundred and forty-eight dollars and thirty-seven and an half cents; and also because the court refused permission to the said *John Feather*, attorney in fact of *George Feather* and *Susanna* his wife, to take out of court the sum of one hundred and forty-eight dollars and thirty-seven and an half cents.

2. Because the court decreed that the sum of three hundred and forty-five dollars and seventy-six and an half cents should be paid out of court to the assignees of *John Oblinger*, if such assignees existed, and if such assignees did not exist, then to be paid out to such assignees as the court of Common Pleas should or might appoint.

3. Because *John Feather*, attorney in fact of *John Oblinger*, and of *George Feather* and wife, has in law and equity and justice, a right

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to take out of court the said sum of six hundred and forty-five dollars and fifty-one and an half cents, in favor of his constituents, the said John Oblinger, and George Feather and wife, the legatees of Christian Oblinger, deceased.

*Montgomery* for the appellants.—The whole fund in court was claimed as belonging to John under the bequest to him of one thousand pounds, by David Rinehart, on his judgment.

He contended, that by a fair construction of the will, John was only entitled to one-third of the four hundred pounds, after the death of the widow, but that the decree of the Orphans' Court of 1801, fixed the persons among whom the money was ultimately to be divided, and recognized the right of the three eldest children; and that this decree would, if any difficulty existed in the question, control the present distribution of the fund in court, as to this point.

He took two grounds in opposition to the claim of Rinehart, on his judgment.

1st. That the interest of John Oblinger, under the will of his father, was an interest in a legacy only, upon which a judgment against him was no lien.

2d. That the judgment of Rinehart was satisfied, in presumption of law, by lapse of time.

1st. By the will the testator directed that his land should be sold or that John should be permitted to take it at an appraisment, but that his executors should execute a deed; and John was only to have a share of the value or price. This although a charge upon the land, was no interest in it, which could be subjected to the lien of a judgment.

2d. It was true that John Oblinger had taken the benefit of the insolvent laws, but this neither arrested the operation of the statute of limitations, nor prevented the effect of lapse of time. The operation of the statute of limitations was not suspended while the act of 13th March, 1812, "for the relief of insolvent debtors residing in the city and county of Philadelphia, and their creditors," was held by the courts of this State to be constitutional and valid. *Hudson v. Carey*, 11 Serg. & Rawle, 10. *Ingraham on In.* 214-215, a lapse of twenty years satisfies a judgment, and here more than twenty years elapsed from the death of the widow, to the time when the claim was made on behalf of this judgment. The presumption too was fortified by the rule taken to show cause why the judgment should not be opened.

The controversy was between John Oblinger and David Rinehart, and the Orphans' Court had no right to interpose the assignees of Oblinger, who had never qualified, who did not claim, and who in fact were dead, to arrest the fund from Oblinger.

The benefit of the insolvent laws was taken by him in 1801, the

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assignees never qualified, and in law the debts then due were presumed to be satisfied, and this proceeding abandoned.

Again, the Orphans' Court has no jurisdiction but in cases of trust under the act of 1713, and cannot decree money to a stranger to that trust, and therefore cannot order the money of the heir to his creditor, either with or without an application. The remedy of *Rinehart*, if his judgment were not satisfied, was by foreign attachment. He also referred to *Read's Dig.* 177. *Toller on Ex.* 235. *Ross v. M'Junkin*, 14 *Serg. & Rawle*, 364. *Kane v. Bloodgood*, 7 *Johns. Ch. Rep.* 90-113.

*Hopkins*, contra. If under the will *John Oblinger* was not entitled to the whole fund, then an average should take place among the legatees; and in that event *Bitzer's* executors should be allowed to come in on account of the money paid to *Sheaffer* in right of his wife *Elizabeth*.

But he contended that the legacy of one thousand pounds to *John*, was entitled to a preference. The testator had thought that he was wealthy, and his will was made under this impression; but it turned out that his estate was nearly insolvent, and the will can only be carried into effect *ci pres*, as near the intention of the testator as this change of circumstances will admit. It was not the intention of the testator to give his whole estate to his wife; as there was not enough to pay all, her legacy should abate in proportion: nor will any fair construction of the will authorise the distribution of the fund to the three eldest children, to the exclusion of the other legatees. Under the circumstances of the fund, the true construction of the will would be to distribute the fund to the legatees *pro rata*. He contended that as it appeared by the will that the legatees, except *John* and *Elizabeth*, had been advanced in the life time of the testator: that as there was a deficiency of assets, these advancements should be taken into view, in regulating the proportions which each should receive out of the fund.

But the legacy to *John* was entitled to be preferred. The will is that the oldest son shall *first* receive one thousand pounds; and the testator assigns the reason for this preference, "because he is my only son." Every expression in a will must, if possible, have effect given to it, and the only meaning of the words "*first and foremost*," in the will is that *John's* legacy is to be preferred.

He contended that the interest which *John* took under the will was an interest in the realty, and subject to the lien of judgments against him. If *John* had taken the real estate at the appraisal under the will, he certainly would have taken it as land. The fund in court must be considered as if the intention of the testator had been carried into full effect. The sale by the sheriff prevented this being done literally, but where the act of the law encroaches upon the intention of the testator, the encroachment

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never goes beyond the necessity of the case. The four hundred pounds is expressly charged upon the land, and as it respects *John's* interest, who was to have taken the land at the appraisement, it is land. That interest has been converted into money, but the nature of the fund remains unchanged. *Diermond v. Robinson*, 2 *Yeates*, 324.

The judgment of *Rinehart* was entered before the sale by the sheriff; it was then a lien, and this sale has no other effect than to bring home the fund for distribution. *Nichols v. Postlethwaite*, 2 *Dall.* 131. *Gause v. Wiley*, 4 *Serg. & Rawle*, 509. *Reese v. Adams*, 16 *Serg. & Rawle*, 40. *Barnet v. Washabaugh*, 16 *Serg. & Rawle*, 410. *Otty v. Shuey's Ex'rs*, 1 *Rawle*, 294.

The circumstances of the case avoid the lapse of time, which is insisted on as evidence of the satisfaction of the judgment. The rule taken by the defendant to show cause why the judgment should not be opened is one circumstance, and his insolvency and removal from the State, another circumstance. And besides this the property in question was in action, and its reduction into possession depended upon a future contingency. But by the act of assembly of 1729-30, *Read's Digest*, 180, in case of insolvency debts are protected from the lapse of time. The right to the fund depended on the death of the widow, and the fund itself was not recovered until 1824, and was not brought into court for distribution until 1828. The suit for the recovery of the money, (the *scire facias*,) was prosecuted for the interest of all concerned. That was issued in 1814; from the death of the widow in 1803, until this time, the only delay occurred, and that is insufficient to warrant any presumption of payment. From that time the rights of all were actively pursued. *Cope v. Humphreys*, 14 *Serg. & Rawle*, 15.

The court were right in arresting the fund until trustees were appointed under the application and discharge of *Oblinger*. A change of trustees of an insolvent has been allowed after the lapse of sixteen years, where the first trustees had never qualified. *Gray v. Hill*, 10 *Serg. & Rawle*, 436. Until the trustees do qualify, the estate of the insolvent is in *gramio legis*.

The decree of 1801, in no way concludes the inquiry now before the court, as by the terms of that decree the fund was to be brought into court for future distribution.

*Norris*, for the appellants in reply. The Orphans' Court have no jurisdiction as to the judgment creditors of legatees, when the fund on which the legacies are a charge is brought into court for distribution. The Orphans' Court, although it is a court of chancery, has its power limited by statutory provision, and cannot go beyond the statute.

By the statutes its jurisdiction is confined to the estates of dead men, and it can make no decree in favour of a creditor of a *cestui*

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*que trust*, who has a fund within its jurisdiction. It has the incidental power of appropriating money to liens on real estate of record, but it cannot go further. Where the debtor denies the debt, it has no power by an adversary suit, to determine the question. It has no power to direct an issue, but in a question incidental to the estate of a decedent. To suffer this court to direct issues in any other controversy would be to make it a court of chancery with general jurisdiction.

The judge of the Orphans' Court had no right to go out of his proper *forum* to award the funds to assignees who had no existence, and to decide that the Common Pleas would create them. The creditors of *Oblinger*, whom the court undertook thus to protect, had no subsisting claim. Direct trusts, created by deed or will, as between *cestui que trust* and trustee, subsist unaffected by lapse of time. They are created by contract, and not by operation of law. All other trusts are affected by the statute of limitations, and lapse of time. And a stranger to the trust, who acquires an incidental right, as against the *cestui que trust*, will be barred by the statute, and his right effaced by time. Where the assignee does not act for a long time, the assignment is presumed to have been abandoned. *Adlum v. Yard*, 1 *Ruxle*, 163.

The interest of *Oblinger* under the will, is an interest in personalty and not in the land. If he had taken it at the appraisement, he would have acquired an interest in the real estate; but until he did this, his only right was to a share of the proceeds of the sale of the land, which was never yet adjudged to be real estate.

The legacy to the wife of the testator was specific, and for that reason is not to abate. She was the chief object of the testator's bounty, and her legacy was to be first invested. And by the plain terms of the will, upon her death, the legacy thus invested was to be divided among the three oldest children of the testator. The construction of the will is derived from itself, and cannot be made to vary by circumstances occurring after the death of the testator, and which could not have been contemplated by him when he made the will.

The opinion of the court was delivered by

HUSTON, J., (who stated the facts).—The return days of process, &c, brought into the Circuit Court from the Common Pleas, Quarter Sessions or Orphans' Court, are fixed by act of assembly, and are the third Monday in March, first Monday in September, and second Monday in December, in each year. It was objected here that as the *certiorari* removing the cause from the Orphans' Court to the Circuit Court, is not returnable for some months, we cannot proceed with the hearing. Whatever may have been the case, when the appeal from the Orphans' Court was direct to the Supreme

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Court, certainly a *certiorari* is not necessary to remove an appeal from the Orphans' Court to the Circuit Court. This would seem to be a writ not issuable by the Circuit Court after judgment by any lower court. The *certiorari* and its return day are then laid out of the case. Is the appeal from the Orphans' Court to be filed before the next sitting of the Circuit Court, in the county, or before the next return day? I think not before the latter. There could be no rule for filing exceptions, or *non pros* for not doing so until the return day next succeeding the appeal. It would expedite business were it considered as returnable to the next sitting of the Circuit Court in that county; but under the existing laws, we cannot compel a return before the next return day. But here the appeal was filed, and decided by the Circuit Court, and no objection on this account made, and an appeal taken to this court, where the objection is first heard. We think it cannot avail at this time, it is too late; and, generally, if a party goes to trial by consent, in a lower court, at an earlier term than he was compellable to do, if he makes no objection then, his objection will not avail him afterwards—I am glad that in this case no injury is done to the party who alleged surprise.

The Orphans' Court, in 1801, in accordance with the will, directed four hundred pounds to be put out at interest, on bond and judgment, binding lands, for the purposes mentioned in the will, the principal payable at the death of the widow. Instead of noticing the bequest of one thousand pounds to *John, first and foremost*, the remaining three hundred and fifty pounds, were divided equally among the children; a judgment creditor of *John's* got his share. We think this was wrong, but it is not before us, and we could not now remedy it if it were. The widow died in November, 1803, but the executors of *Oblinger*, to whom the bond was given, did not collect the money, nor even bring suit till 1814, and the cause was not tried and money raised till 1828. The executors then brought it into the Orphans' Court, and several questions were made as to the distribution. A person who had obtained a judgment against *John* claimed it, and the court decided against him: he then brought the record into court and showed that *John* had applied for the benefit of the insolvent acts; had assigned to trustees for the use of his creditors, and been discharged. The court decided the judgment was no lien, and rightly. Whatever *John's* interest originally was, under the will of his father, in the lands of his father, yet when those lands had been sold, and the money brought into court, and was again put out to interest, it became personalty; the bond was a mere chose in action; and although judgment was afterwards entered on it, yet whoever heard of a judgment being a lien on another judgment? The court next decided that they could not award the money to *John*, as his interest was vested in



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his assignees, and it made no difference that the original assignees were dead, and no successors had been appointed. They would give time to apply to the Common Pleas to appoint others. This opinion was clearly right. If the debtor of an insolvent who has assigned, pays the insolvent, the assignees can compel him to pay again to them. If it were not so, our insolvent acts would be a fraud on the creditors. And it would be strange if our courts were not bound to take notice of a general law. It does not alter the case that the application was not made by an assignee. Chancery when informed of a party in interest, not before it, always brings him in. But it has been said the statute of limitations has barred all claims against *John*, or that from lapse of time his debts are presumed to be paid. Our insolvent act of 1729-30, and every act since provides, that notwithstanding the discharge of the insolvent under the act, all debts due and owing from such debtor, and all and every judgment had and taken against him, shall stand and be good and effectual in law, to all intents and purposes, against the lands, tenements and hereditaments, goods and chattels of such debtor, which he or any other person or persons in trust for him at the time of his discharge, shall have had, or at any time thereafter shall or may be in any way seized or possessed of, interested in, or entitled to in law or equity. This would seem to put the statute of limitations out of the way in such case: but further, the court may, on consent of a majority in number and value of the creditors, make an order that the insolvent shall not be sued for seven years. If the statute of limitations runs against a person discharged under the insolvent laws, this order would put an end to all claims barred by a lapse of six years. I do not say that lapse of time, much greater than that allowed by the statute, will in no case raise a presumption of payment. This will often be the case, when assignees act and have property in their hands. This however was not such a case as would justify the Orphans' Court in, at once, considering these debts paid. Where a creditor returns no funds, but some debts not to be collected till after a certain event, (as here the death of his mother,) it would be strange to say the debts were to be presumed paid before the fund came to hand. This is however a matter to be decided in the Common Pleas. The Orphans' Court were right in detaining the money until assignees should appeal. Those assignees will be trustees for the creditors, and for *John*, if there are no creditors, or there be a surplus after payment of his debts. We think, however, that a time should have been limited within which the creditors should apply and get assignees; *John* is not to wait forever in suspense; we therefore confirm this part of the decree, with this addition, that if the creditors do not apply, and get assignees who will give security at

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next term of the Common Pleas, in August, 1830, that the money be paid to *John Oblinger* or his lawful attorney.

There was another matter mentioned which admits of no doubt. One of the sisters prayed the money awarded by the decree of the court, to be paid to her. There was an appeal to the Circuit Court, and a few minutes or a few hours elapsed before the recognizance of bail could be drawn up, and bail brought before the court, but it was done the same day, and before the court rose. And the court refused to order the money instantly to her; most clearly the court were right. To have given it to her, under such circumstances, while the recognizance was writing, and bail coming in, would have been grossly wrong. The decree, with the addition above mentioned, is in all respects confirmed.

Decree affirmed.

**SIMON GRATZ, JOSEPH GRATZ and JACOB GRATZ, Administrators of MICHAEL GRATZ, deceased, against LEVI PHILIPS, LEAH PHILIPS and BELIAH COHEN.**

An agent thus proved his own authority, "I never executed any other deed of defeasance than the one in question. I frequently wrote letters, signed receipts, and other papers of consequence for him, (the principal) by which he at all times considered himself bound. I kept all his books of accounts for upwards of thirty years; never had a written power of attorney." *Held:* That a deed of defeasance, executed by such an attorney in the name of his principal, is not evidence to convert an absolute deed to the principal into a mortgage.

A wife executrix, whether so constituted before or after her marriage, may be sued with the other executors; or if sole executrix, with her husband; and in either case, after judgment against her as executrix, may have a *devastavit* fixed on her and her estate, and her personal or real estate sold for it.

Wherever a husband and wife can sue or be sued by adversary process, an amicable action can be entered, and she and her rights are as much bound as if the proceeding had been adversary.

APPEAL from the Circuit Court of Lancaster county, held by GIBSON, Chief Justice.

The suit was instituted by the following agreement.

*Simon Gratz, Joseph Gratz, and  
Jacob Gratz, Administrators of  
Michael Gratz, deceased.*

v.  
*Levi Philips, Leah Philips and  
Beliah Cohen.*

} Amicable action in the Common Pleas of Lancaster county, of January term, 1822. Case.

We agree that the above action on the case, be entered in the Common Pleas of Lancaster county, of the term of January, 1822: And we do hereby refer all matters unsettled and in variance be-

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tween the parties, to *Casper Shaffner*, Junior, *John Reynolds* and *Joseph Ogleby*, or to a majority of them, to meet at the house of Col. *Jacob Slough*, in the city of Lancaster, at any time the parties shall agree upon, upon thirty days' notice, and to make their award into the Prothonotary's office, with power to adjourn from time to time, until the cause shall be decided; and it is agreed that the arbitrators shall have no power in relation to any lands unsold at the time of instituting this suit, and that no advantage be taken by either party as to the form of suit, or the liability of the parties in it, and that the award and judgment thereon be final. Witness our hands, this 29th January, A. D. 1822.

SIMON GRATZ, one of the Adm'rs of Michael Gratz.

LEVI PHILIPS, Executor of Joseph Simon.

MOLTON C. ROGERS, Attorney for Defendants.

J. SIMON COHEN, Attorney for Defendants.

WM. NORRIS, Attorney for Plaintiffs.

The award made under the above agreement was set aside. *Narr.* was then filed in *assumpsit* for money had and received by defendants. Defendants plead *non assumpsit*, *actio non accrevit infra sex annos*, payment with leave, &c. and set-off; replication, *non solvit*, that the action did accrue within six years, and issues. Replication afterwards added, that moneys were received by defendants, as trustees, to which there was no rejoinder.

The origin of this cause was a partnership in trade entered into in 1760, between *Joseph Simon*, *William Trent*, *David Franks*, and *Levy Andrew Levy*. Upon the settlement of their accounts, 28th February, 1769, *Trent* was found indebted to *Simon* and *Franks*, on the general partnership account, four thousand and eighty-two pounds, and to *Simon* on his separate account for which he held his bonds. To secure the payment of the debt to *Simon* and *Franks*, *Trent* then executed a mortgage to them of "seven thousand five hundred acres in Cumberland county," and conveyed other lands to *Simon*, either in satisfaction or as security for his separate debt. On the 18th May, 1790, *Franks* assigned his half of this mortgage to *Bernard* and *Michael Gratz*; and on the 28th of the same month, ten tracts, supposed to be part of the mortgaged lands, were sold on the mortgage, and bought in by *Simon*, who, on the 2d August following, executed a deed declaring that he held these ten tracts for himself and *Michael Gratz*; "provided, that if hereafter the said assignment, from said *Franks* to said *Gratz* should prove invalid, that then this present acknowledgment shall be null and void." On the 9th and 24th of same August, *Simon* bought in, the two other tracts sold on the mortgage. It appeared that prior to the assignment of the half of the mortgage by *Franks*, to *Bernard* and *Michael Gratz*, *Franks* had by a general assignment of all his property transferred his interest or half of the mortgage to a certain *Tench*

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Coxe and J. Hazelhurst, in trust to pay a debt to *Amos Hayton*; and that about the year 1802, *Thomas Billington* set up a claim on this transfer. Mr. *Simon Gratz* then gave satisfactory security to Mr. *Simon*, against *Billington's* claim; and *Simon* on the 2d July, 1802, executed a new declaration of trust in favour of *Simon Gratz*, for the benefit of *Michael Gratz*, and without any condition whatever. After this a certain *John F. Mifflin* set up a claim under *Trent*, to a number of tracts which he alleged were not included in the mortgage from *Trent* to *Simon* and *Franks*: a compromise was made by which *Simon* held eight of the twelve tracts purchased at sheriff's sale, and *Simon* and *Mifflin* held the remaining four, and seventeen others, as tenants in common. *Simon's* interest in the lands being thus changed, on the 12th January, 1804, he executed another declaration of trust, in favour of *Michael Gratz*, and without any condition annexed, but with a clause contained therein, that *Simon* and his representatives shall conduct the sales. The assignment of *Franks*, under which *Billington* claimed, on the 16th May, 1793, was transferred to *George Davis*, who transferred the same to *Gratz*, for six hundred dollars, after the death of *Simon*. *Joseph Simon* died 24th January, 1804, having by his last will and testament appointed the defendants his son-in-law *Levi Philips*, and his two daughters *Leah* and *Beliah* to be his executors, and vested in them power to sell his lands: by this authority the lands were sold at different periods from 1804, until 1818, inclusive, and the money received by *Levi Philips*. The plaintiffs claim a moiety of the proceeds of sale of the lands held by deeds to *Simon* alone, and one-fourth of the lands held by *Simon* and *Mifflin*.

The defendants set up various matters of defence. First. That they are not liable to account, because the assignment of the 18th May, 1790, of *Franks* to *Bernard* and *Michael Gratz*, has proved invalid, and that consequently the several declarations of trust under it fail, and are not binding on *Joseph Simon* or his representatives. Second. That they are not jointly liable, there being no evidence of the receipt of any money by any of the defendants, except *Levi Philips*. And, third. That on account of the coverture of *Leah Philips*, this suit cannot be sustained at all. An additional defence as to part of the plaintiffs claim, and the right to a set-off arose from the following circumstances. Two of the tracts of land which had been sold by the defendants, were designated as being in the names of *William Cox*, and *Christian Dunegan*, and which the defendants say were the private property of *Joseph Simon*. Another tract of land in the name of *William Trent*, which had been sold and accounted for by the defendants by mistake, was also the private property of *Joseph Simon*, and that for the amount for which they had accounted, they were entitled to a set-off.

The claim to these lands arose in the following manner: on the

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12th January, 1764, *Andrew, William and John Foster*, conveyed by three separate deeds, eighteen hundred acres, including the tracts in question, to *John Proctor*, who on the same day conveyed to *William Trent* and *Joseph Spear*. It seemed that *Coxe* and *Peters* were in partnership with *Trent*, as to his part. 22d June, 1764, *Spear* conveyed his half to *Trent*, and on the 28th February, 1769, *Trent* conveyed his interest under *Spear's* deed to *Joseph Simon*. Afterwards on the 8th April, 1769, a partition of these lands was made, when the *William Coxe* and *Christian Dunegan* tracts were allotted to *Trent*. These lands were what are called the "Proctor lands;" and much evidence was given by the defendants to prove that *Simon* during his life, and up to the time of his death, supposed they were his "George's Valley lands," and his own private property; and some evidence that Mr. Gratz treated those lands (George's Valley) as the private property of Mr. Simon, contrary to his knowledge of the fact.

Defendants offered in evidence the record of an action of account render, *Michael Gratz v. The present defendants*, executors of *Joseph Simon*, in Philadelphia, to July term, 1807, to show that if the mistakes about what were the "Proctor lands," and "George's Valley lands," were mutual, the plaintiffs have not abided by it, but have recovered a large portion of the proceeds of the "George's Valley lands," and therefore *Joseph Simon* is not bound by acts done in pursuance of it; this evidence, together with part of the deposition of *Zalegman Philips* to prove the same thing, were objected to by the plaintiffs, and rejected by the court.

The plaintiffs for the purpose of showing that the deed of 28th February, 1769, *Trent* to *Simon*, was not an absolute conveyance, offered a defeasance of the same date, executed by *Levy Andrew Levy*, attorney of *Joseph Simon* to *William Trent*, together with the deposition of *Levy Andrew Levy*, taken on a commission to Baltimore in the action of account render of *Gratz v. Simon's* executors, by which some evidence is given of his own authority, to execute the defeasance as the attorney of *Joseph Simon*.

This evidence was all objected to, and the objections overruled by the court.

Much other evidence, having some relation to the different features of the case, was given on one side and the other, but which it is not material to state here.

The counsel for the plaintiffs requested the court to charge the jury upon the following points.

1. That as it is expressly stipulated by the agreement under which this suit was entered in the Common Pleas of Lancaster county, to January term, 1822, No. 162, that "no advantage be taken as to the form of suit, or the liability of parties in it;" it is not competent for the defendants now to resist a recovery on

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behalf of the plaintiffs, on the ground that the action is misconceived in point of form, or that the defendants are not jointly liable as trustees of plaintiffs, under the evidence given in the cause.

2. That purchasers for a valuable consideration, *bona fide*, and without notice of any claim upon the estate, are entitled to the peculiar favour and protection of courts of justice; and as *Michael Gratz*, the plaintiffs' intestate, purchased from *Joseph Simon*, for a full and valuable consideration, a moiety of the lands sold to *Joseph Simon*, by the sheriff of Northumberland, without notice at the time of the purchase, of any title or claim to the lands by *Joseph Simon*, or any other person adverse to the title acquired by *Joseph Simon* under the sheriff's sale, and constituted him, *Joseph Simon*, his trustee to sell the lands thus purchased; it is not competent for the representatives of *Joseph Simon*, now to resist the recovery of the plaintiffs for their half part of the proceeds of the lands sold, on the ground of an outstanding title in favour of third persons.

3. That a trustee cannot dispute the title of his *cestue que trust*, and therefore the defendants, the representatives of *Joseph Simon*, cannot resist the title and right of the plaintiffs to recover in this suit. They are estopped by the several deeds given in evidence on part of the plaintiffs, from alleging that no title was acquired under the deeds by *Michael Gratz*, for all the lands mentioned in them.

4. That from the lapse of time, and the non action and acquiescence of the trustees, the jury are bound to presume the trust created by the deed of the 20th March, 1786, from *David Franks* to *Amos Hayton's* assignees, satisfied and extinguished, and that this stale and abandoned claim can form no bar to the plaintiffs' right to recover in this suit.

5. That if the jury believe, that in August 1790, when *Joseph Simon* purchased at the sheriff's sale, and sold a moiety of the lands purchased to *Michael Gratz*, he, *Joseph Simon*, had and possessed the title papers to the tracts of *Robert Sample*, *Thomas Camelyne*, *Francis Silver*, *Joseph Silver* and *Samuel Sample*, called now the George's Valley lands; he did know or was bound to know, that these lands were acquired under the deed of 26th April, 1779, from *William Trent*, in favour of the bond and mortgage given to *Franks* and *Simon*, and were company property, and were not his own private estate; and that the impression of *Joseph Simon*, whensoever derived, that the George's Valley lands were his private estate, cannot affect *Michael Gratz*, who was a *bona fide* purchaser, on the 2d August, 1790, of the tracts of land now claimed by the representatives of *Joseph Simon*.

6. That if the jury believe that *Joseph Simon* made the declarations of trust of 2d August, 1790, of 26th July, 1802, the compro-

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mise with *John F. Mifflin*, of 30th December, 1802, and the declarations of trust, of 12th January, 1804, with the circumvention or fraud of *Michael Gratz*, or of any person acting as his agent, practised upon him, in order to procure these papers, then *Joseph Simon* and his representatives are estopped, in conscience, justice, and law, from denying the right of *Michael Gratz* and his representatives, to recover the half of the net proceeds of the sale of the tracts of land, in the name of *Coxe*, *Dunegan* and *Trent*, even if *Joseph Simon* himself entertained a mistaken impression as to what were his George's Valley lands, from 1790 till his death, in 1804.

The defendants requested the court to charge the jury as follows:

1. That the assignment of *David Franks* to *Bernard* and *Michael Gratz*, and to *Michael Gratz*, of 18th May, 1790, under which plaintiffs' claim, is invalid, the said *David Franks* having by a previous assignment, dated 20th March, 1786, transferred all his property real and personal; and that the acceptance of the order and the several declarations of trust, made upon the faith of the validity of the assignment of 1790, are not binding.

2. If the jury believe that the acceptance of the order, and the declarations of trust were made by *Joseph Simon*, under the belief that the tracts called the George's Valley lands, were his private property, and if it were well known to *Simon Gratz*, the agent of *Michael Gratz*, that such were Mr. *Simon's* impressions, the concealment of the claim upon the part of *Michael Gratz* and his agent, is a fraud which will vitiate the whole transaction.

3. The plaintiffs cannot recover in this action, unless they prove a receipt of money by the defendants jointly; and the coverture of *Leah Philips*, one of the defendants, is a fatal objection to plaintiffs' recovery.

4. This suit should have been instituted against the defendants as executors of *Joseph Simon*, deceased.

5. If the jury believe that the tract in the name of *William Coxe* sold to *John Wicks*, and the one in the name of *Christian Dunegan* sold to *George Knep*, called the Proctor lands, were the private property of *Joseph Simon*, the defendants are not liable to account for them: defendants for the same reason, would be entitled to a credit or set-off for the amount of the tract in the name of *William Trent*, heretofore accounted for by mistake.

A verdict was rendered for the whole amount of the plaintiffs claim, except the allowance of a set-off, that was admitted, and a small deduction for commissions. A motion was made for a new trial for the following reasons.

1. The court erred in not admitting in evidence, the exemplification of the record of the action of account render between the administrators of *Michael Gratz*, and the executors of *Joseph Simon*,

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brought in the Supreme Court of the Eastern District of Pennsylvania, to July term, 1807.

2. The court erred in rejecting part of the deposition of *Zalegman Philips*, a witness on behalf of the defendants.

3. The court erred in admitting the deposition of *Levy Andrew Levy*, taken under a commission in the action of account render in the Supreme Court of the eastern district of Pennsylvania, to July term, 1807, No. 6, the record of which suit had been rejected as above stated.

4. The court should have charged the jury that the agreement in relation to the liability of the parties extended only to the award and proceedings of the arbitrators, and that it had no connexion with the agreement to enter the amicable action—the agreement to enter the action and that to refer being entirely distinct.

5. Because the court ought to have charged the jury, that as there was no evidence of the receipt of any money arising from the sales of lands by any of the defendants except *Levi Philips*, or that the others were jointly responsible, the issue was not supported, and the verdict should be for the defendants.

6. Because the court ought to have directed the jury, that as it was in evidence that *Leah Philips* was a *feme covert*, the action against the defendants jointly, for sums received by *Levi Philips*, could not be legally sustained.

7. Because the court should have charged the jury, that the assignment of 18th May, 1790, from *David Franks* to *Bernard and Michael Gratz*, and *Michael Gratz* was invalid, and that consequently the declaration of trust of 2d August, 1790, was without consideration and of no validity; and that the declaration of 26th July, 1802, and of 12th January, 1804, though absolute on the face of them, were of no validity, if the assignment of 18th May, 1790, was invalid.

8. Because the court should have charged the jury, that if they believed, that at the time Mr. *Simon* accepted the order on the 22d May, 1790, he was ignorant of the previous assignment of *David Franks* of 20th March, 1786, and that *Michael Gratz*, or those who acted for him, knew it, and concealed the fact from *Joseph Simon*, that then the said acceptance of 22d May, 1790, and the subsequent declarations, were of no validity to entitle the plaintiffs to recover.

9. The court should have instructed the jury, that if they believed from the evidence, that *Joseph Simon* was induced to accept the indemnity, and make his declarations of trust of 26th July, 1802, or of 12th January, 1804, by any representations of *Simon Gratz*, contained in the letter of 23d May, 1802, which said representations have not been proved nor attempted to be proved, then



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and declarations are to be considered as not binding or affecting the said *Joseph Simon*.

10. That the court ought to have left it to the jury to decide whether the acceptance of 22d May, 1790, or any of the declarations of trust subsequently made by *Joseph Simon*, were, under the circumstances, obtained from him fraudulently or otherwise.

11. The verdict is manifestly wrong, because it is in evidence, that at the time of the execution of the several declarations of trust, *Mr. Simon*, who could neither read nor write, "except his name," was under the mistaken impression that the George's Valley lands were his private property, and was not aware that the Proctor lands were included in the sheriff's sale; that, therefore, the said declarations were void in relation to the Proctor lands, viz: the lands in the name of *Coxe, Dunegan and Trent*.

12. Because the verdict is manifestly wrong, as it charges the defendants with the proceeds of the tracts, in the name of *William Coxe*, and *Christian Dunegan*, which tracts were the private property of *Joseph Simon*.

13. The verdict is manifestly wrong, because no credit is given for the proceeds of the tracts in the name of *William Trent*, paid by *Joseph Simon*, in his lifetime, to the plaintiffs' intestate by mistake, and to which the said plaintiffs and their intestate had no claim.

14. Because the court erred in charging the jury, that the deed of 28th February, 1769, from *William Trent* to *Joseph Simon*, for a moiety of the ten tracts derived from Proctor, was a mortgage.

15. Because the court erred in charging the jury, that if the said deed was a mortgage, the private debt of *Joseph Simon* was, from the length of time, to be considered as satisfied, and that *Joseph Simon* had no title.

16. Because the court ought to have charged the jury, that if the deed of 28th February, 1769, was originally a mortgage, the possession of the title papers by *Joseph Simon*, the possession and claim of ownership over the George's Valley lands, which he believed to be the Proctor lands, and the lapse of time, were circumstances for their consideration, from which they might infer that the paper called a defeasance, executed by *Levy Andrew Levy*, on the 28th February, 1769, had been surrendered by *William Trent* to *Joseph Simon*, if it ever had been in possession of, or delivered to said *Trent*, of which there was no evidence.

17. The verdict is manifestly wrong, because the jury have found the full amount of interest, from the time of the several receipts of money claimed by plaintiffs, although there was no evidence of any demand for any sums received since 1806.

18. Because the court did not answer the second point of the defendants.

19. The court should have submitted to the jury, as being their

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peculiar province, the questions of fraud or mistake, raised in the points submitted to the court by defendants.

The motion being overruled, and judgment entered on the verdict, the defendants appealed to this court.

*Champneys*, for appellants.

By the agreement of the 29th January, 1822, the parties had in view a reference of their matters in variance to an amicable tribunal, and not to a court and jury. It is admitted that neither *Leah Philips* nor *Beliah Cohen*, ever received a dollar of the money claimed to be recovered from them in this suit; and there was no other consideration for their entering into the agreement. When this cause was formerly before this court, a construction was given to this agreement, *Gratz v. Philips*, 14 *Serg. & Rawle*, 144, where it is argued by the plaintiff's counsel, that if the case should be remitted to the Common Pleas, the plaintiffs would lose the advantage of one part of the agreement, the *joint liability of the defendants*. As to the construction of the agreement, were cited, *Massey v. Thomas*, 6 *Bin.* 333. *Pow. on Con.* 147. *Messina v. Hurtzall*, 5 *Bin.* 388. A court should examine with astuteness, an agreement which creates a liability, which equity would not enforce.

*Leah Philips* was a *feme covert* when she signed the agreement, and therefore no judgment against her, predicated upon it, can be sustained. 2 *Saund.* 101, note a. *Sliver v. Shelbaugh*, 1 *Dall.* 165. *Brown v. Caldwell*, 10 *Serg. & Rawle*, 114. *Stultzfoose v. Jenkins*, 8 *Serg. & Rawle*, 177. *Grasser v. Eckert*, 1 *Bin.* 586. 2 *Stark. Ev.* 702, note I.

If *Joseph Simon* was induced to make the declaration of trust of the 2d August, 1790, by the representations of Mr. Gratz, that the assignment to *Coxe* and *Hazelhurst* was invalid; such declaration of trust would not be binding. *Perkins v. Gay*, 3 *Serg. & Rawle*, 331. *Levi v. The Bank of the U. S.* 1 *Bin.* 27. 1 *Fonb.* 106. 2 *Pow. on Con.* 125. But at all events the court should have submitted it to the jury, as requested. 2 *Stark. Ev.* 508. *Dornick v. Richenbaugh*, 10 *Serg. & Rawle*, 84. *Work v. McClay*, 2 *Serg. & Rawle*, 415. *Jones v. Wiles*, 8 *Serg. & Rawle*, 150.

The second point the court did not answer, which was error. *Powers v. McPherrin*, 2 *Serg. & Rawle*, 44. *Belin v. Hopkins*, 13 *Serg. & Rawle*, 45.

The deed of 28th February, 1769, of *William Trent* to *Joseph Simon*, for the moiety of ten tracts of land, was absolute upon its face, and the alleged defeasance of *Levy Andrew Levy*, attorney for *Joseph Simon*, should not have been received in evidence, for the attorney had no power to make it; nor did his deposition establish the fact that he had power; and if it had, it should not have been admitted; for an attorney in fact is not competent to establish his

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own authority. *Gordon v. Bulkley*, 14 *Serg. & Rawle*, 331. *Nicholson v. Mifflin*, 2 *Dall.* 246. *James v. Gordon*, 1 *Wash. C. C.* 335. *Bellas v. Hayes*, 5 *Serg. & Rawle*, 427. *Paley on Agency*, 133. *Wentz v. Dehaven*, 1 *Serg. & Rawle*, 312.

Joseph Simon always considered the "George's Valley" lands as his private property, until the date of the letter of *Simon Gratz* to *Beliah Cohen*, 6th March, 1804; and the court should have received in evidence the deposition of *Zalegman Philips* to prove this fact; and also the action of account render, to show the time of the discovery of the mistake, and that the plaintiffs received the benefits of it.

The court erred in instructing the jury to allow interest upon the money from the time it was received. A trustee is not chargeable with interest from the receipt of the money, nor until demand made. *Knight v. Reese*, 2 *Dall.* 182. *Brown v. Campbell*, 1 *Serg. & Rawle*, 176. These moneys were not demanded before suit brought, for the letter of *Simon Gratz*, of 27th October, 1805, demands an account of the "George's Valley" lands only. A demand before the money is received is an illegal demand, and will not alter the rule of law in this particular.

*Montgomery*, for appellees.

When the judge who tries a cause in the Circuit Court is satisfied with the verdict, it must be a strong case of injustice if this court will grant a new trial. *Cain v. Henderson*, 2 *Bin.* 108. *Ludlow v. The Un. Ins. Co.* 2 *Serg. & Rawle*, 119. *Commonwealth v. Eberly*, 2 *Serg. & Rawle*, 9. *Com. of Berks Co. v. Ross*, 3 *Bin.* 520. *Smith et al. v. Odlin*, 4 *Yeates*, 468. *Jordan et al. v. Meredith*, 3 *Yeates*, 318. *Campbell v. Sprout et al.*, 1 *Yeates*, 327-363.

As to the defence predicated upon the assignment to *Coxe* and *Hazelhurst*, the answers are abundant and easy. There was a resulting trust to *Franks*; and it behooved the defendants to shew that the fund was insufficient without these lands, which they did not do. The lapse of time would preclude any claim upon it. But in 1793, *Coxe*, *Hazelhurst* and *Franks* assigned to *Davis*; and in 1806, *Davis* assigned to *Gratz*, by which the subject matter of this defence was absolutely vested in the plaintiffs before this suit brought; and for another reason, that after *Simon* knew all about this assignment, he made two other unconditional declarations of trust. As to there being fraud in *Gratz* procuring these declarations, the idea is negated by the fact, that he afterwards authorizes *Simon* to sell the lands and account to him.

The deed of *Trent* to *Simon* was not an absolute deed, but a mortgage: this is manifest from the consideration being five shillings, and from the defeasance bearing the same date, and which is sufficiently proved by the oath of *Levy Andrew Levy* that he had power to execute it, and that *Simon* declared it was a mortgage:

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and by the testimony of *S. Etting*, that *Levy Andrew Levy* was constantly in the habit of writing and executing papers for *Simon*, who could not write himself more than his name: and by a paper in the hand writing of *William Trent*, these lands are enumerated as his *unsold* lands.

But suppose they were his private property, they were certainly sold by the sheriff, and purchased by *Simon* for himself and *Gratz*. *Simon* is estopped by his declarations of trust, from alleging a defect of title to these lands.

The action of account render, the record of which was offered, was brought for an account of the sale of the five tracts of "George's Valley lands;" it was therefore irrelevant, as was also the parol evidence of the same thing as contained in the deposition of *Zalegman Philips*.

By the declaration of trust, *Simon* reserved to himself the right to sell the lands, and by the same instrument bound himself to account for the proceeds of such sales *when received*. He is therefore, by his contract, bound to pay interest for the money from the time it came to his hands, or those of his personal representatives.

*Leah Philips*, although a *feme covert*, is bound to account. Mr. *Simon* could not, by the appointment of a *feme covert* to execute his will, sell the lands, and receive the money, and thereby defeat the claim of the plaintiffs against his estate, or against his representatives. A *feme covert* may be an executrix with the consent of her husband, *Toll. Law of Ex'rs*, 31-241; and if she takes letters, she is liable to all the incidents of an executor. *Ib.* 357. *Wentworth*, 207. The appointment of husband and wife to execute a will, makes them one executor. All executors must be sued. *Gordon*, 290. *Wentworth*, 95. *Levans*, 201. A married woman cannot administer without the assent of her husband, and the administration then devolves on the husband. *Gordon* 154. *Ld. Raym.* 369. *Com. Dig.* title *Adm'n*, letter *D.* 1 *Salk.* 306. *Wentworth*, 199. 4 *Term Rep.* 616. *Wm. Black. Rep.* 801, A *devastavit* will bind both husband and wife. 2 *Swinburn*, 750. If the husband submits to award the right of the wife, after his death she is bound. *Kidd on Awards*, 46.

*Norris*, on the same side.

The defendants do not predicate their defence upon merits of their own. They do not contend that they are entitled to the whole proceeds of the sales of the land; but they lay hold of every possible claim, of every one, even remotely connected with the transaction, not to protect themselves, but to injure the plaintiffs.

*Coxe* and *Hazelhurst* have not been heard of since 1793; they cannot defend for them. A trust untouched for twenty-four years, is extinguished in England and every state of this Union. As between

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the trustor and trustee, lapse of time may not operate; but between the trustee and *cestue que trust*, or the creditors, twenty years is a flat bar, if nothing is done between that period. As to the eighteen hundred pounds, to secure the payment of which the trust was created, the law presumes it was paid.

Not until the trial of this cause in 1822, before the arbitrators, did the plaintiffs ever hear of the claim of *Joseph Simon*; nor that the tracts in the name of *Coxe* and *Dunegan* were his private property.

The antiquity of the transaction, by which *Levy Andrew Levy*, declared that the deed of the 28th February, 1769, was in the nature of a mortgage, is decisive, when taken in connexion with the settled law, that a mortgage may be discharged by parol, because it is a mere security for a debt. Why take a mortgage of the same date on the Vandalia estate, to secure the partnership debt, and take an absolute deed in consideration of five shillings, for a private debt?

*Michael Gratz* was entitled to the one half of the proceeds of the sale by the sheriff, which was the consideration for the moiety of the ten tracts of land.

The claim of *Billington* gave rise to the repeated declaration of trust of 1802; and that of *Miffin* to the again repeated declaration of trust of 1804.

Trustees are liable for interest in some cases without a demand, and in others not until a demand is made. Wherever the contract does not upon the face of it require a demand, interest will run from the receipt of the money. We are entitled to recover it in this case, because, First. The contract demands it. Second. All our letters and correspondence in 1805, contain a demand of it. Third. The conduct of the trustees has been vexatious.

Can this suit be supported? *Joseph Simon* by his will in 1799, appoints the defendants to be his executors, and vests in them power to dispose of his real estate; they thereby become, *nolens volens*, as to *Michael Gratz*, his trustees. We having had the right and remedy against *Joseph Simon* in his lifetime, must therefore after his death, have the same right and remedy against his executors, who voluntarily take upon themselves the trust.

A *feme covert* may take an estate and hold it even in trust, when her husband does not dissent. *Com. Dig.* 98-110, *till*, *Baron and Feme*. *Coke Lit.* 3 a. and 356, b. *Doug.* 452. 1 *Roll. Ab.* 660. Upon a lease to husband and wife, debt for rent may be maintained against both. 1 *Roll. Ab.* 110. 2 *Levins*, 63. The wife cannot be called on to give bail. She cannot plead separately. The bail of the husband is the bail of his wife; so of his plea. Although a wife cannot contract for herself, yet she may contract in trust for another, with the consent of her husband. In *Will v. Franklin*, 1 *Bin.* 502, the assent of trustees is presumed. *Mrs. Philips* could not in the execu-

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tion of this trust, make a contract, by which her husband's rights could be affected; if she did her duty, he could not be affected in any way. She is not here sued for a violation of a contract made by her; but for a violation of her duty under a trust, accepted by the consent of her husband.

*Cohen in reply.*

It is one of the first principles of the law on this subject, that a contract entered into by a *feme covert* during coverture is void; as to the *feme* she is under the influence of her husband; and, in the language of the Chief Justice, in *Lancaster v. Doland*, 1 *Rawle*, 231, "the law will not permit her to be coaxed or bullied out of her rights." If the will of the husband can make his wife a party defendant to an action, or if the wife can agree to become a party thereto, and be bound by its consequences, every protection which the principles of the law throw around a *feme covert* are swept away; for she can in every case do indirectly, what it is admitted she cannot do directly. Cited, *Gross v. Eckert*, 1 *Bin.* 575.

It is said that this court in the exercise of its equitable powers, may grant relief. But what grounds are there for equitable relief here against Mrs. Philips, who it is not pretended ever received one dollar of the money for which this suit is brought? In the case of *Lang v. Keppele*, 1 *Bin.* 123, referred to by the appellees, there was a distinct ground of relief, which does not exist here. It would be monstrous to charge the separate estate of Mrs. Philips, for no other reason, than that she, while a *feme covert*, entered into an agreement, which if she had been a *feme sole*, would have bound her. It is always for the protection of the wife, that the law permits her to be joined with her husband as a defendant, and then only when in a fiduciary character. It is said her separate estate is liable for a *devastavit* committed by her. This is only true in the case where she was executrix or administratrix before marriage. *Gord. Law of Dec.* 266. 2 *Brown Chan.* 323. *Toll. Law of Ex.* 358-9, 430. 1 *Salk.* 306. This distinction is reasonable: for a *feme sole* executrix accepts the trust voluntarily, and receives the advantages of her *devastavit*. But when the trust is cast upon her during coverture, she can only accept with, and cannot refuse to accept without the consent of her husband; and whether she accepts or refuses the trust it is for his benefit or advantage, and his estate alone should be liable for a *devastavit*.

But it is said it is no protection to one *qui juris*, that he is joined with one incompetent to contract. This is true as regards contracts, but not true as to proceedings at law.

The tracts of land in the name of Cox and Dunegan, were derived from Proctor, and Simon always claimed them as his own private property, supposing however that they were the "George's Valley lands;" this mistake he might readily have made, for he

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could neither read nor write. That he did thus mistake, is fully established by the facts, that he exercised acts of ownership as to them; he leased them; he mortgaged them; and, in 1802, sold them to *Potter, Morris and Craig*. In his books, the expenses of the "George's Valley lands" are charged to his private account.

*Gratz* knew he was under this mistake; for in a letter of 27th October, 1805, to *Levi Philips*, he says, "I always did consider the 'George's Valley lands' as belonging to the holders of *Trent's* bond and mortgage." He always had access to *Simon's* papers, and had the deed for these lands in his possession. It is not until after the death of *Simon* that he claimed an account of the "George's Valley lands," which he knew *Simon* had always claimed as his own property. On this part of the case, the court took the facts from the jury, by saying "that as to the three tracts, the defence failed."

If the deed of *Trent* to *Simon* of the 28th February, 1769, was originally intended as a mortgage, it subsequently became an absolute deed by the acts and consent of the parties. This is inferable from the fact, that it was not proceeded upon to judgment; that it was not put upon record until 1789; and the defeasance never was recorded, which is inconsistent with the character of *Simon*, as an honest man, unless the parties had previously agreed to consider it an absolute deed. *Simon* took possession of the "George's Valley lands," supposing he was taking the "Procter lands," under this deed to *Trent*: the mortgage was therefore accompanied by possession for more than twenty years, which of itself makes the deed absolute. The other points in the case are fully stated in the opening.

The opinion of the court was delivered by

HUSTON, J.—I shall attempt to give a statement of this case; the facts of which, in the order in which they were submitted in the Circuit Court, and here, it was not easy to comprehend at first view.

On 16th May, 1760, a partnership as merchants, or Indian traders, was entered into by *Joseph Simon*, *Levy Andrew Levy*, *David Franks* and *William Trent*.

About 1762–3, the Indians plundered their storehouses, and they became involved in debts and difficulties; and then, or soon after, the partners ceased to do business as a firm.

On the 4th January, 1769, *William Trent* gave a bond to *David Franks* and *Joseph Simon*, for eight thousand one hundred and sixty-four pounds, conditioned to pay four thousand and eighty-two pounds, the sum due them on settling the accounts. How *Levy Andrew Levy* got out of the firm, or settled, does not appear.

On the 28th February, 1769, *William Trent* gave to *Franks* and

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*Simon*, a mortgage on seven thousand five hundred acres of land in Cumberland county, (this is the only description,) and some other imaginary property, to secure the above bonds, and the debt due on them.

*William Trent*, besides the above debt to the creditor partners of the company, owed a private account to *Joseph Simon*, to secure which, he, on the same 4th January, 1769, gave to *Simon* his bond for eight hundred and eighty-five pounds fourteen shillings, conditioned to pay four hundred and forty-two pounds seventeen shillings, on 4th January, 1770.

Before the date of this bond, viz: 12th January, 1764, *Andrew Foster* had conveyed to Captain *John Proctor*, five hundred acres of land on Mahony creek, *John Foster* had conveyed to the same, three hundred acres, and *William Foster*, one thousand acres.

On the same day, *Proctor* conveyed to *Trent* and *Joseph Spear*, the same lands. On the 22d June, 1764, *Spear* conveyed his moiety to *Trent*. On the same day on which *Trent* gave the above mentioned mortgage to *Franks* and *Simon*, viz, 28th February, 1769, they conveyed their moiety of these lands got from *Spear*, to *Joseph Simon*. The conveyance is endorsed on the back of *Spear's* deed. The lands are here called ten tracts, said to contain three thousand eight hundred and fifty acres; the consideration in the deed, five shillings. The other moiety belonged to *Coxe* and *Peters*. But another paper was given in evidence, dated 4th January, 1769, and signed by *Joseph Simon*, in which he recites a debt of eight hundred and eighty-five pounds fourteen shillings, conditioned to pay four hundred and forty-two pounds and seventeen shillings, which would be due in two weeks. That indenture witnessed, that on the said *William Trent* or *George Croghan*, for him, making over to said *Joseph Simon*, as security for his debt, the full quantity of five thousand acres of land, out of a tract of land which said *Trent* holds in company with *George Croghan*, on the head of the river Delaware, in the county Albany, and province of New York, and the said *Croghan* engaging to have it effectually transferred to said *Simon*, as security for the debt aforesaid, and the said *William Trent*, making over likewise, a quantity of land purchased of *John Proctor*, (the half of which belonged to *William Coxe* and *Richard Peters*.) then the said *Joseph Simon* doth agree, that the payment of the said debt be deferred for one year, and a new bond taken for the same, payable in one year from that date. And further, there was offered and received in evidence, a defeasance to the deed of 28th February, 1769, dated the same day, and signed *Levy Andrew Levy* for *Joseph Simon*; this made the deed of the same date a mortgage to secure the debt of four hundred forty-two pounds seventeen shillings.



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This made it proper to introduce evidence as to payment of the bond, and that was as follows: On the back of the bond was endorsed a receipt, dated 28th December, 1781, for a bond for three hundred forty-five pounds nine shillings and six pence, on account of interest.

A bond, dated 28th December, 1782, from *Trent* to *Simon*, for seven hundred ninety pounds and seventeen shillings, conditioned for the payment of three hundred forty-five pounds nine shillings and six pence; and another bond dated 20th March, 1784, same to same, for one hundred ninety pounds fifteen shillings and eleven pence, conditioned for the payment of ninety-five pounds seven shillings and eleven pence, in one year.

Among the lands which came through *Proctor*, were three tracts on Middle creek, in the names of *William Coxe*, *William Trent* and *Christian Dunegan*.

This part of the case must be kept in mind; for the greatest part of the difficulty and dispute in this cause, arose from a real or supposed confusion of the tracts conveyed to *Simon* alone for his own debt, with other lands hereafter to be mentioned, which were conveyed to him by *Trent*, in payment of the debt to him and *Franks*. The validity of the defeasance, and the authority of *Levy Andrew Levy*, to sign it for *Joseph Simon*, was also contested.

The next fact, in order of time was, that on the 4th of January, 1779, *William Trent*, for the purpose of discharging the mortgage to *Franks* and *Simon*, conveyed to *Simon* one thousand nine hundred and twelve acres of land, at twenty shillings per acre, and a receipt for one thousand nine hundred and twelve pounds, was that day endorsed on the bond.

And on the 26th April, 1779, he also conveyed three thousand five hundred and sixteen acres, at the same price of twenty shillings per acre, to *Joseph Simon*, for the same purpose. Among the tracts, (and the respective quantity of each was specified,) were five tracts in George's Valley. It may be noted here, that on the face of the deed, these whole three thousand five hundred and sixteen acres were conveyed expressly on account of the partnership debt; and these payments deducted from the principal and interest of the bond, would leave about three thousand dollars still due.

In 1786, *David Franks* being in London, and indebted to one *Amos Hayton*, executed a deed of trust to *Tench Coxe* and *Isaac Hazelhurst*, of certain specified lands, (none of those herein before mentioned,) and all the personal estate and effects of said *David Franks*, in North America, and also, all debts and sums of money due and owing to said *Franks*, from any persons in America, in trust, to pay the debt to *Amos Hayton*, and the residue to *Franks*.

On the 18th May, 1790, *David Franks*, recites the bond and mortgage from *Trent*, to himself and *Simon*, and in consideration

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of a debt due to *Bernard* and *Michael Gratz*, of one thousand nine hundred sixty-eight pounds two shillings and two pence, and a debt to *Michael Gratz* of six hundred and twenty-four pounds, he assigns to them all his interest in said bond and mortgage, reserving to *Joseph Simon* his expenses respecting the premises, over and above his (*Simon's*,) one half of said bond and mortgage. And in case the proceeds of the said mortgage should exceed his debt to *Gratz*, the overplus for *David Franks*.

Along with this assignment and of the same date, *Franks* drew an order on *Joseph Simon*, to pay to *Bernard* and *Michael Gratz*, one half part of what should be received on the bond and mortgage. This was presented to *Joseph Simon*, and by him accepted on 22d May, 1790. *Joseph Simon* had at this time sued out a *levari facias* on the mortgage, and levied it on fifteen tracts of land in Northumberland county; of which three were purchased by strangers, ten by *Joseph Simon*, and two in the name of *Levi Philips*, but treated by *Simon* as his own ever after.

On 2d August, 1790, there is a declaration of trust by *Joseph Simon*, in favour of *Bernard* and *Michael Gratz*, which recites the assignment of *Franks* to *Gratz*, and adds, "provided nevertheless, that if hereafter the said assignment should prove invalid, then this present acknowledgment shall be null and void." This declares *Michael Gratz* joint owner with *Simon* in the lands purchased, and in the money received from those who had purchased the three tracts: and promised, as the lands should be sold, to pay to *Michael Gratz* one half of the proceeds. It mentions ten tracts.

20th May, 1802, *Levi Philips*, who was the son-in-law and clerk of *Simon*, informs *Simon Gratz*, then acting for his father *Michael Gratz*, that *Thomas Billington* was claiming under the assignment to *Hayton*.

23d May, *Simon Gratz* replies, he had long known of that claim, and that the assignment was not available, &c. On the 26th July, 1802, *Simon Gratz*, as attorney for *Michael Gratz*, gives to *Joseph Simon* a bond of indemnity against the pretended assignment of *David Franks*, so far as it may be used to affect the rights of *Simon* to the mortgaged lands. Same day *Levi Philips*, for *Joseph Simon*, and in his presence, gives a new declaration of trust to *Michael Gratz*, for the lands purchased; and promises to pay over half of the money, as soon as it is received from the sale of the lands.

On the 12th January, 1804, another deed of trust was executed by *Joseph Simon*, like the last.

*John F. Mifflin*, claimed the lands bought in under the mortgage and brought an ejectment for them; and on 30th December, 1802, *Mifflin*, *Simon* and *Gratz* made an agreement, by which *Mifflin* got three of the tracts bought by *Simon*, and one bought by *Philips*. *Simon* and *Gratz* got the remaining eight tracts, and one half of

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seventeen tracts, which *Mifflin* claimed, and which they claimed under the mortgage for seven thousand five hundred acres.

24th January, 1804, *Joseph Simon* died, having first made his last will and testament, by which he appointed the defendants to be his executors.

I now go back to *Franks'* assignment to *Hayton*. On the 16th May, 1793, *Tench Coxe* and *Isaac Hazelhurst* and *David Franks* made an assignment to *George Davis*.

On the 24th July, 1806, *George Davis*, assigned to *Simon Gratz*. This suit was brought to recover one half of the money actually received since the death of *Joseph Simon*, from the sales of the eight tracts contained in the sheriff's deed to *Simon*, and the declarations of trust, and not ceded to *Mifflin*, and one-fourth of the purchase money received by defendants from the sale of the seventeen tracts, of which *Mifflin* was half owner, and *Simon* and *Gratz*, were joint owners of the other half.

Of the preceding, the defendants gave in evidence all that related to the private debt from *Trent* to *Franks*. All the deeds from the *Fosters* to *Proctor*, from *Proctor* to *Spear* and *Trent*, and *Trent* to *Simon*.

A partition was made between *Trent*, *Coxe* and *Peters*, on the 8th of April, 1769, by which the tracts in the names of *William Trent*, *William Coxe*, and *Christian Dunegan*, fell to *Trent*; and as defendants alleged, thus became the exclusive property of *Joseph Simon*. They showed, that in the adjustment with *Mifflin*, the tract in the name of *William Trent*, was allotted to *Mifflin*, and the other two, *Coxe's* and *Dunegan's*, had been sold by defendants; and although these three tracts had been levied on as *Trent's* by the sheriff of Northumberland, and sold as forming part of the seven thousand five hundred acres, and bought by *Simon*, and a trust as to half of them declared for *Gratz*, yet they alleged all this was mistake. They proved that *Joseph Simon* could not read or write, except his name. They also gave evidence to show that *Joseph Simon*, through his whole life, (under a mistake to be sure,) considered the *George's Valley* lands, as those called the *Proctor* lands. That the expenses, taxes, &c. of the other lands were charged in his books, one half to *David Franks*, while he was owner, and after the assignment by *Franks* to *Gratz*, were charged to *Gratz*; while in his books, all charges arising on the *George's Valley* lands, were made as arising from his own land, and that many of these entries were made by *Simon Gratz*, who lived with *Joseph Simon*, his grand father. They showed that he leased them, mortgaged them as his own on the 28th June, 1790, and afterwards discharged the mortgage; that *Simon Gratz*, witnessed an agreement, for the sale of one of them, and knew the whole transaction, and the mistake, as appeared by his letter to one of the defendants, soon after the death of *Joseph Simon*.

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The defendants also gave in evidence the assignment of *Franks* to *Coxe* and *Hazelhurst*, in 1786; the subsequent assignment of *Franks*, *Coxe* and *Hazelhurst* to *Davis* in 1793, and that of *Davis* to *Simon Gratz* in 1806.

The defendants then offered in evidence an action of account render, No. 6, of July term, 1807, *Michael Gratz* against the present defendants, as executors of *Joseph Simon*, deceased, which as amended stands,—*Michael Gratz*, surviving partner, and who had been jointly interested with *Bernard Gratz*, deceased, to show that if the mistakes were mutual, and both parties acted on the supposition, that the "George's Valley lands" were the "Proctor lands," that the plaintiffs have not acted as partners under the deeds of trust of 1790–1802 and 1804, by *Simon* to *Michael Gratz*, but had recovered the eleven-twelfths of the price for which *Simon* sold them; and, that so far, he had rendered *Franks'* assignment to *Gratz* invalid, and therefore the deed of trust became null and void. And they further offered the deposition of *Zalegman Philips*, counsel in that cause, to prove what was then claimed by the plaintiffs, and other matters. The court rejected the record, and that part of the deposition which related to what was claimed and proved in that cause.

To understand this, it is necessary to examine, for what the former suit was brought, and by whom, and against whom. When *Joseph Simon*, in January, 1779, took nineteen hundred and twelve acres of land, for nineteen hundred and twelve pounds; and in April, three thousand five hundred and sixteen acres, for three thousand five hundred and sixteen pounds, in payment of the mortgage, he held those lands by previous or subsequent agreement, in trust for himself and *David Franks*, and after the assignment by *Franks* to *Bernard* and *Michael Gratz*, in trust for himself and the Messrs. *Gratz's*, as is alleged, and shown by both parties. He sold certain of those lands, particularly the five tracts in George's Valley and two others, in his lifetime, and received the purchase money.

In the account render suit offered in evidence, *Michael Gratz*, in his own right, (for he had a separate bond of his own secured by the assignment,) and as surviving partner of *Bernard Gratz*, sued for an account of those specified lands, stating and describing them; and that they were held in partnership by *Joseph Simon*, and *Bernard* and *Michael Gratz*. The account made out by the auditors, states each tract, and the price at which it sold; but strange as it may seem, they give to *Joseph Simon* one-twelfth part only, and the other eleven parts to the plaintiff. The exceptions to the report not being filed in time, it was confirmed. 3 Bin. 474. It appears by the admissions and proof in this cause, that there the plaintiffs declared on one contract and recovered on a different, and even an inconsistent one. *Bernard Gratz* never had any interest in the *Hayton*.

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deed: it was purchased by *Michael Gratz*, after *Bernard's* death, which appears in that record to have been in 1804. Besides, under the evidence given in this cause, that *Joseph Simon* applied to *Gratz* respecting this claim, and was told it was worthless, it could not be that the partner who thus informed him, should afterwards purchase it for a mere trifle, and use it to its full amount against his partner, at least not as to partnership property. 5 *Johns. Chan.* 407. Add to this the bond of indemnity given by *Gratz* to *Simon*, that it should not affect the partnership claim under the mortgage; which I would consider a covenant that it should not. It presents a case to my mind, without the least shadow of doubt, but we cannot reverse or affect that judgment; nor can we, as is asked, give credit in this suit, although it is an equitable action, for what *Michael Gratz* recovered, there beyond his share; because that would in effect be reversing that judgment; and because this suit is between different parties, and to settle the accounts of a different partnership. When in 1790, *Joseph Simon* and *Michael Gratz* purchased the lands at sheriff's sale, the purchase money belonged to *Joseph Simon*, *Bernard* and *Michael Gratz*. The lands purchased belonging to *Joseph Simon* and *Michael Gratz*, and they held them, not under the mortgage, and old partnership, which were ended by the sale, but under the sheriff's deed and the contract, of which the several deeds of trust of 1790, 1802 and 1804, are the evidence. This suit is not against the estate of *Joseph Simon*, but against the defendants as trustees of moneys received by them in that capacity; and not for any thing received by *Joseph Simon*, in his lifetime. Whatever remedy then (if there is any) the estate of *Joseph Simon* may have against the plaintiffs, on account of the former agreements and proceedings on them, it must be in some other action; for this purpose, that record, was not evidence in this case. But it was offered in another view, to show that there was a former suit, and that in that suit, the plaintiffs in this cause alleged and showed, that *Joseph Simon*, during all the latter part of his life, was impressed with the belief, that the "George's Valley lands," were the "Proctor lands," and his individual property; that the plaintiff then proved this to be a mistake, and that the tracts in the names of *William Coxe*, *William Trent*, and *Christian Dunegan*, were really the "Proctor lands," and that the plaintiff then recovered on this proof. And they contended that if the plaintiffs then recovered the price of the "George's Valley lands," on proving the mistake, defendants here ought to be discharged from accounting for the price of the *William Coxe* and *Christian Dunegan* tracts. The plaintiffs reply, that by levying on, and selling those tracts, as included in the mortgage, and executing the several deeds of trust, the defendants are estopped from setting up any other title. I do not think the last deeds of trust make the matter any stronger than if it had been

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left on the first, *under the circumstances of this case*. And as the plaintiffs themselves proved the mistake, and recovered, I think the defendants ought to be permitted to show this, and to show also, the real state of facts: and unless some cause is shown why it should be so, I do not see why the same party shall correct the mistake when he gains by it, and hold the other party to it, when he would gain by holding him to it. I am not to be understood as giving an opinion of what ought to be the final decision on this point; that must depend on all the evidence: I only say the evidence ought to be admitted, as important in the decision.

But it is said next, that the deed from *Trent* to *Simon* for the "Proctor lands" was only a mortgage, and that the mortgage is to be presumed paid from lapse of time. Of this last I doubt, under the circumstances of the poverty of *Trent*, till his death, and other matters in this cause. Presumption met by presumption is for the jury. In deciding whether this was a mortgage, the deed or writing of defeasance, signed *Levy Andrew Levy* for *Joseph Simon*, is of primary importance: although not under seal, yet it operates to destroy a deed under seal, and to take away the title to lands. It affects not the property of the firm of which *Levy Andrew Levy* was a partner, but the private estate of *Joseph Simon*. I think it much stronger than the case of *Shaub* and *Withers*, decided this term. I did not agree to that case, but am bound by it. But by the evidence he had no authority: he says, "I never executed any other deed of defeasance than the one in question. I frequently wrote letters, signed receipts, and other papers of consequence for him, by which he at all times considered himself bound. I kept all his books of accounts, for upwards of thirty years; never had a written power of attorney." Now to me this presents the idea of a clerk in a store, or acting partner, and not an attorney in law or fact as to lands. He does not say any of those important papers related to lands, or that he had authority to execute this, or that *Joseph Simon* knew of it. And the testimony of *S. Etting* goes no farther. We think this paper ought not to have been received. But what difference can it make in this cause, *if it is once found by a jury, that the whole proceeding as to the tracts Cox and Dune-gan, is a mistake and error*, whether they belonged to *Joseph Simon*, exclusively, or to *William Trent's* heirs, and *Simon* was only mortgagee? In either case the plaintiffs have no claim to them. And if the plaintiffs' right to them fails, it would be improper in us to decide between *Simon's* heirs and *Trent's* heirs; the latter are not before us.

I am of opinion then, that the record of the action of account render was admissible, not for the purpose of revising, correcting, or in any way affecting that judgment, but to show there was a former suit, and to let in proof, if such there be, that in that cause

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the plaintiffs proved the *Coxe* and *Dunegan* tracts to be the "Procter lands," and that *Joseph Simon* was mistaken as to these and "George's Valley lands," as being material evidence in deciding whether the plaintiffs are entitled to the proceeds of those two tracts. By the bye, it seems as if this record was never presented to the chief justice who tried the cause, in that point of view.

And, I am also of opinion, that the defeasance signed by *Levy Andrew Levy*, for *Joseph Simon*, was not evidence.

Mr. Gratz has been called an innocent purchaser, and this insisted on; it is true he was a joint purchaser of lands sold by the sheriff on a mortgage, the joint property of *Simon* and *Gratz*, though the name of *Gratz* was not in the mortgage. Who directed the levy does not appear; each had an equal right to do it. The purchase was a mere arrangement; being owners of the mortgage, neither paid any thing; it extinguished so much of a joint debt. Neither of them purchased from the other, or paid any thing to the other. There is nothing in the case to show that *Gratz* would have agreed to receive half the price at which the lands sold, and let *Simon* keep the lands. The price bid for the whole ten tracts, was only one thousand and thirty-two pounds eight shillings. At all events, the mortgage, (though I by no means say it was not an absolute deed,) was not extinguished by lapse of time, in 1790. *Trent* had been paying or renewing the securities in 1785; and *Simon* having purchased and taken possession of these *Coxe* and *Dunegan* tracts, and no claim by *Trent* or his heirs, it will be for the court and jury to say, whether his claims can now be opposed to that of *Joseph Simon*; and if not, the right to the price of these two tracts, must depend on the fact of complete mistake in *Joseph Simon*, or not.

I now come to the objections to the action.

There had been a prior suit between the parties, but in which the defendants were sued as executors of *Joseph Simon*. Wearied with the contest, they agreed to discontinue that suit, and entered the present amicable suit. It contains the following clause, "it is agreed that the arbitrators shall have no power in relation to any lands, unsold at the time of instituting this suit; and that no advantage be taken by either party as to the form of the suit, or the liability of the parties in it." It is now contended, that the parties defendants, being trustees, each was alone liable for what each received; and that *Leah Philips*, being the wife of *Levi Philips*, could not be sued, nor could any judgment be rendered against her. These objections, or at least one of them, was before the court, and decided. 14 *Serg. & Rawle*, 144. There never could be any doubt about it. There are often difficulties in proving which of two trustees actually receives the money; and the circumstances which will excuse or make liable all of them. They may waive all testimony

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on this point, and agree to be liable: and it is greatly unreasonable, after thus putting the plaintiffs at ease on this point, to move for a new trial, because they did not prove what was expressly admitted. Defendants were all executors of *Joseph Simon*, and trustees of these lands; they knew their own situation, and how the money received, had been divided among them; they have put it out of their power to object on this account, in this suit.

But another objection is made, that *Leah Philips* is the wife of *Levi Philips*, and a married woman, and cannot be sued, or cannot enter into an amicable action. A number of cases on this point were cited, and positions laid down, which were contrary to common impressions and constant practice.

A wife may be sued together with a husband, for a debt of the wife before marriage, and judgment rendered against both. A wife executrix, whether so constituted before or after her marriage, may be sued with the other executors, nay must be; or if sole executrix, sued with her husband: and in either case, after judgment against her as executrix, may have a *devastavit* fixed on her and her estate, and her personal or real estate sold on it.

Her husband and she may bring an ejectment for her lands, and two verdicts and judgments will bind and bar her right forever—so if she is defendant. Her husband and she may, nay her husband alone, may have partition or valuation, under our intestate acts; and her husband and she may be plaintiffs or defendants, in a writ of partition at common law, which under our acts of assembly may eventuate in a sale of the lands, and division of the money. In all these cases the husband can appoint an attorney at law for himself and wife, and she is bound, both during his life, and after; except perhaps, on proving actual fraud. A husband may submit to arbitration out of court, the rights of his wife, either as an individual, or as executrix or administratrix, and she is bound.

And I take it now, in this State, wherever a husband and wife can sue or be sued, by adversary process, an amicable action can be entered, and she and her rights are as much bound as if the proceeding had been adversary. It is only *in pais* that her rights to land are not affected, except by a separate examination. In court no such thing is required. The affairs of this world require that disputes should be ended. The married women are interested. It is not true in fact that husbands wish to destroy the property or rights of their wives; and we cannot act on that principle.

In chancery, if a married woman is a trustee alone, or jointly with her husband, or with others, she must be brought in; and as the chancellor decrees against each, according to their several faults, the decree effects her and her estate, or not, according as the justice of the case requires.



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Cases have been cited making a difference between the decisions at law and in chancery, as to a husband's liability; and between his liability where he marries an executrix, and where she becomes so after marriage.

A husband who marries a woman, is liable in all actions, and to all demands during coverture, which could have been brought against her if sole; whether they are against her as an individual, or executrix, or trustee. If she was executrix before marriage, and she is not sued in his life time, the common law gave no remedy against his representatives; for there must be first a suit against the executrix and judgment *de bonis testatoris*, before she would be fixed for a *devastavit*, and his representatives could not be sued as representatives of the testator. In such case, on a bill in equity, they did not hold his representatives liable in every case. If the goods were wasted before he married the executrix, his estate was not liable. If the *devastavit* was after marriage, (as it must be if she was made executrix after, or might be if she had the goods when he married her,) his estate was liable. For the law in such case gave him the control and management of them. And this is the real and substantial distinction, and the *dicta* in 3 *Brown's Chan.* 323, are mistakes of the reporter.

The law was thus perfectly settled before 1776, and so settled since the case in 3d *Brown*, and as *Brown* is cited by every modern writer who turns compiler, and so is read; I refer to 1 *Shoals and Le Froy*, 248, *Adair v. Shaw*, where all the old cases are collected, and the above conclusion drawn.

If the goods were left in specie at the death of the husband, his representatives were not liable; if laid out in lands or goods and left to the wife, she must answer for them, and if she was executrix, and the goods were given away, or released, and no benefit to him or her, his estate was liable in the first instance, and then hers, if she had any.

The fiction of law that a wife has no understanding, and can do no wrong, has but a limited existence in chancery, where the matter is considered, more according to the fact and the reality of the case. In this country a married woman cannot be imprisoned: If she has no estate of her own, a judgment against her and her husband cannot affect her more than a judgment against him. If she has an estate, and has acted in such a way as to make that estate liable by adversary suit, in which her husband must and could employ counsel for her, the same result may be produced by an amicable suit. This is not an application by her, to be relieved from a suit fraudulently entered by her husband in her name: The same counsel who signed the agreement for an amicable suit, make the motion.

Where one objection has been made as to form of action, it must

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be a very uncommon case, in which I would listen to another, on a ground which existed before the time of the former.

GIBSON, C. J.—I join in granting a new trial, but for a reason common only to my brother SMITH and myself; so that the judgment on this point, although conclusive between the parties, will not be a precedent for future cases. The action is against the defendants in their own right; and being for what was not a debt of the decedent, it could be brought against them in no other way. But a *feme covert* who, as such, can do no act nor incur any responsibility, can make no contract whatever. In actions to which she was liable at her marriage, and for torts and trespasses during the coverture, she must be impleaded jointly with her husband, but that she cannot be impleaded on a contract made during the coverture, is as well established as any other fundamental principle of the common law. *Palm. 313. 16 Johns. 281, Edwards v. Davis.* Mr. Philips would be exclusively chargeable for the receipts of his wife, which are in point of law *his* receipts, even though the money were paid into her hands as a trustee. It is on this principle alone, that a husband is chargeable for goods which have been received through the hands of his wife to his use. But the very case occurred in *Grasser v. Eckert, 1 Bin, 575*, where the wife was not allowed to be charged with her husband for money jointly had and received. If that case is to go for any thing, it negatives the notion of a special usage in analogy to the practice of courts of chancery, and asserts the broad principle of the common law. What is there, then, to distinguish it from the case at bar? Without her assent, neither her husband nor her attorney could subject Mrs. Philips to an action for what is not her proper debt. But what capacity had she to assent, or to become a willing party to the action, if she had no capacity to assent and become a party to the cause of action? A joint promissory note would not have bound her. But if she may become a party to the action, she may doubtless still set up her original irresponsibility. By no means. She is again to be met by her agreement to waive objections on that and every other ground. The matter then comes to this, that although she is disabled by the common law from binding herself by contract, she is nevertheless able to subject herself to all the consequences of a contract, by volunteering as a defendant, and estopping herself by an agreement from asserting the original disability which the law interposed for her protection; and this, notwithstanding that such an agreement whether made by herself or some one on her behalf, is as much a contract as any which constitutes an original cause of action.

As regards other important parts of the case, I have the misfortune to stand alone. Our difference of opinion in respect to these,

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is attributable, it seems to me, to that comparative disadvantage in obtaining a precise knowledge of the circumstances, which is always felt in a greater or less degree by the judges who have not tried the cause, and particularly a cause like the present, the transactions of which are spread over a period of more than half a century. The paper book is made up of condensed memoranda of the evidence, and without a laborious investigation of a mass of documents which have not been furnished, it is unintelligible. It will therefore be necessary for me to develop the particular points, by separating and putting aside the facts and circumstances that do not immediately belong to them.

It seems to be agreed that the record of the action of account render, was incompetent evidence, in the aspect in which it was presented. But as it is intimated that it may be competent in some other aspect, it is necessary to consider the recovery in that action in all its bearings. It is conceded that it cannot be unravelled here; but an intimation is given that it may have been a breach of the covenant of indemnity, the fallacy of which is made apparent, simply by an exposition of the facts.

Before his assignment to the Messrs. Gratzes, Franks had assigned his whole estate to trustees for payment of a particular debt; and when Mr. Simon executed the first declaration of trust in favor of Michael Gratz, it was on condition that the assignment under which the latter claimed, should not prove invalid. Most clearly the purpose of this condition was to secure Mr. Simon from being compelled to pay the proceeds of the lands twice—to Gratz after having paid them to the trustees. The aim of Mr. Simon, who was a stakeholder, was to be secure in paying to the person entitled, all the monies in his hands as the estate of Franks—not protection from payment of a farthing which was not his own. Such was the nature of this condition, which however, is no further important than as it serves to explain the covenant of indemnity which supercedes it. After a recital of the premises of that covenant, that Gratz is entitled to the effects in the hands of Mr. Simon, but that these were claimed under the previous assignment to the trustees, and that Mr. Simon was unwilling, to decide, follows a declaration that Mr. Simon “is willing to pay ALL the monies and to assign and set over ALL the effects which are, or were in the hands of the said David Franks, in his lifetime, or at the present time, to the said Simon Gratz on being indemnified or kept harmless by reason thereof.” Accordingly Gratz covenants to indemnify him against the demand of the trustees “for any part of any money or effects, or other property belonging to the estate of David Franks in his (Simon’s) hands, WHICH SHALL BE PAID, SECURED TO BE PAID, ASSIGNED OR SET OVER TO THE SAID Simon Gratz,” “so that the said Joseph Simon shall not now, nor at any time hereafter, come

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to, or suffer any loss, damage, expense, or trouble, in, or by reason of the premises, or touching the monies, effects, or property so paid, assigned, or set over, to the said Simon Gratz." Thus the covenant is not that the trustees, or any one in their stead, may not recover any part of the estate of *Franks*, but only such part as shall have been paid, or secured to be paid to *Simon Gratz* as the agent of his father under the subsequent assignment. If then *Simon Gratz* has not recovered on the title of the trustees, any thing which had been previously paid, or secured to be paid to himself or his father as the representative of *Bernard* and *Michael Gratz*, he has broken neither the letter nor the covenant, which forbids no assertion of the right of the trustees that might not involve Mr. *Simon* in the consequences of a mispayment. Now the proceeds of the *George's Valley* lands, which had not been included in any of the deeds of trust, had neither been paid, nor secured to be paid, to *Michael* or *Simon Gratz*; and Mr. *Simon's* estate has been compelled to pay no where, any thing that was not due somewhere, (and we are to suppose the recovery on account render to have been just,) what is the difference whether the recovery was under the one assignment or the other? Or how can it be said that the recovery was not, in fact, on the assignment to *Bernard* and *Michael Gratz*? Either assignment would pass the whole interest of *Franks*; and though in the order which accompanied the assignment to the Messrs. *Gratzes*, (which by the bye, is not necessarily a part of the title,) his interest in the mortgage is estimated at a moiety, yet if the estimate were erroneous, it would not restrain the operation of the assignment, or bind the rights of the parties under it. The same estimate is in Mr. *Simon's* declaration of trust of the ten tracts, and the same remark is applicable to it, that it was no part of the title in the action of account render, which was brought for the proceeds, not of those ten tracts, but of the *George's Valley* lands, which had been conveyed in part payment of the mortgage long previously. There is nothing, then, in the way of an intendment that the recovery was under the assignment to *Bernard* and *Michael Gratz*; and it is certainly no breach of the covenant that they have recovered, on that or any other title, if such be the fact, more than the sum to which they were in justice entitled; especially as the excess is chargeable to the supineness of Mr. *Simon's* executors in omitting to file exceptions to the report of the auditors in due season. Indeed, if we take for granted what is assumed in the opinion of the court, that the recovery was actually as surviving partner of *Michael Gratz*, it would follow demonstrably, that it must have been on the assignment to the Messrs. *Gratzes*; for the title of the trustees never vested in *Bernard*, who was dead when it was got in by *Simon Gratz*. But the fact is, that *Michael* brought the action in his own name, and counted

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simply in his own right. But whether the recovery were on the one title or the other, it is sufficient that nothing is to be paid *twice* by the estate of Mr. Simon in consequence of it; the contingency, against which the covenant was intended to guard, not having happened nor being about to happen.

On what ground, then, can the record possibly be evidence? It is said to be admissible to shew that there was a former suit; that the plaintiff in that cause proved the tracts in the names of *Coxe* and *Dunegan* to be part of the Proctor lands; and that Mr. Simon was mistaken as to these and the George's Valley lands. I believe these are nearly the words. It is admitted, then, that the record is not evidence as any independent fact; but as inducement, and to what? To the fact that the plaintiff proved on the trial of the action of account render, what no one has disputed here. That these two tracts are part of the Proctor lands, was taken for granted by all parties throughout the course of the trial, the only question having been, whether they had passed to Mr. Simon by the transfer of *Spear's* deed. The question of their identity with the Proctor lands, was altogether foreign to the action of account render, which had for its object the proceeds of the George's Valley lands, which had, at a different time, been conveyed to Mr. Simon in part satisfaction of the partnership debt; and whether these two tracts were part of any body of lands owned by Mr. Simon on his separate account, was no part of the inquiry. It was sufficient for Mr. Gratz not to claim the price of them, that they were not sold. Neither do I perceive how the record tended, either directly or as an inducement, to show that Mr. Simon had confounded the Proctor and the George's Valley lands. The action was brought after his death, and neither depended on, nor contributed to illustrate the state of his belief; and as inducement to evidence of mistake, it was superfluous, the defendants having been let into all their proofs of the fact without it. But the truth is, their aim was an indirect one—not to make way for evidence of mistake, but to make the alleged mistake *tell* if proved, by evidence, *aliunde*. It was to persuade the jury that *Simon Gratz* had suffered his grandfather to die in ignorance of a fact material to his interest, and taken advantage of his own superior knowledge the moment he was gone. But the record was not offered in the aspect in which it is declared to have been competent; and, I therefore presume the new trial is granted exclusively for the admission of the defeasance executed by Mr. *Levy*.

I must here take occasion to repeat what I said more than once at the argument, that this paper was admitted on other grounds than a supposed valid execution of it under a parol authority. It bears even date with the conveyance to Mr. Simon, to which it has reference, and was probably executed at the same time and place.

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Add to this, that Mr. *Simon* was not only unlettered and dependent in these matters on the services of his friends, but it had appeared in the evidence, that this form of execution, had been used by him in another instance, in which Mr. *Philips*, one of the defendants, executed a deed for him, in *his presence*, and as his attorney. On these proofs, I thought the instrument might go to the jury, leaving them to judge, from the circumstances, whether it had been executed in Mr. *Simon's* presence and with his assent; and if so found, it would according to *Shaub v. Withers*, (*ante*.) 285, be his immediate deed. But not to insist upon this, there is another, and it seems to me an impregnable ground of competency, which I suggested on the trial and at the argument, without having since heard it contested. It is this. In addition to the circumstances just noted, the conveyance to Mr. *Simon*, was for the nominal consideration of five shillings, *being accompanied with the grantors bond for the payment of a debt*; and this bond and conveyance had been preceded by another deed, in which an acknowledgment of the debt is coupled with a declaration that these very lands among others were to be conveyed to Mr. *Simon* to secure it. Mr. *Levy* who executed the defeasance as Mr. *Simon's* attorney, was his confidential agent in transacting his current business, signing in that capacity receipts and other important papers in Mr. *Simon's* name, who never testified dissatisfaction at any of his acts, but always on the contrary ratified them. Mr. *Levy*, had however, executed no other deed than the one in question. All this was proved by the testimony of Mr. *Etting* and Mr. *Levy*, in a way to ensure belief. Now then, if a mortgage was INTENDED, of which there cannot be a rational doubt; and if a valid execution of the instrument was prevented by ignorance or mistake, WHAT WOULD A CHANCELLOR DO? Where an agreement for a mortgage was drawn by the mortgagee, who omitted to insert a covenant for redemption, the mortgagor who was only a markman, was permitted to give evidence of the mistake, *Joynes v. Slatham*, 3 Atk. 389. Is not that the case at bar? So where the mortgage was in two deeds, and the mortgagee omitted to execute the defeasance, *Maxwell v. Montacute*, Prec. Chan. 526, S. C. 1 Eq. ca. Abr. 19, pl. 4. 5. The very case again. So also where an absolute deed was made, and the grantee, instead of taking the profits, took the interest of his money, this was given in evidence as explicative of the transaction, (*id.*) If then a chancellor would not shut his eyes on any of the attendant circumstances, he most surely would not shut them on the defectively executed defeasance, of all others the most powerful to show not only ignorance and mistake, but the precise nature of the meditated TERMS of the forbearance. What has our own court done? In *Wharf v. Howel*, 5 Bin. 499, where the question of mortgage or not, depended partly on parol evidence, the whole was left to the jury as matter of fact, particularly the

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testimony of the scriviner who had told the parties that the defeasance in connexion with the absolute deed constituted a mortgage. If then the jury should be of opinion that the parties proceeded on an impression that the defeasance executed by Mr. *Levy*, constituted a mortgage at law, it shall be taken for such in equity. But how shall the jury judge of their impression, or the terms they had in view, without seeing the paper which contains those terms. Of their actual intent as deducible from the contemplated defeasance in connexion with the other circumstances, it is impossible to doubt. At a time when there was, as I have been told by the late Mr. Justice *Yeates*, who came to the bar in 1766, but seven country lawyers in the Province, and consequently when every man was his own lawyer, it is by no means strange that these parties should have thought that a deed might be executed under a parol authority. My brother *Huston* himself, has just said, he would even now have thought so too, had it not been for our recent decision in *Shaub v. Withers*.

From another position in the opinion of the court, I am constrained to dissent in explicit terms. Among the lands supposed to be bound by the mortgage, and by consequence actually bought in by Mr. *Simon*, are the two tracts in the names of *Coxe* and *Dunegan*. To rebut the claim of the plaintiffs to the price of these, the defendants attempted to show that they were bought in and included in the deed of trust by mistake, being in fact Mr. *Simon's* own property under *Trent's* conveyance for Mr. *Simon's* separate debt. In reference to this, it is said in the opinion of the court, *that if it be once proved to a jury that the whole proceeding as to these tracts was by mistake, then whether they belonged to Simon exclusively, or to Trent's heirs, Simon BEING BUT A MORTGAGEE,—in EITHER case the plaintiffs have no claim to them.* I admit here, and I so directed the jury at the trial, that if Mr. *Simon* ignorantly declared a trust of his own land, it would not bind him, and this whether the *cestui que trust* had shown the truth of the case on another occasion or not. And by the bye, nothing of the kind is pretended to have been shown in the action of account render. Take it, however, according to the other alternative, that Mr. *Simon* was but a mortgagee; and the facts connected with the presumption of payment from lapse of time, will stand thus. On the bond which accompanied the conveyance in 1769, there is endorsed a receipt for interest paid by a fresh bond in 1781. Again, in 1784, (not 1785, as assumed in the opinion of the court,) *Trent* gave Mr. *Simon* another bond, but whether for principal, or for interest due on the preceding, or for any other consideration, as there is no other receipt endorsed on either of them, cannot be conjectured. Then from 1781 to the inception of this suit in 1822, is a period of forty-one years; or even from 1784 to 1822, is a period of thirty-eight years, during which no act was

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done or step taken by Mr. *Simon*, to obtain satisfaction of this debt. It is said he took possession of these lands, and treated them as his own. It must be within the recollection of every one who heard the trial, that not a spark of evidence was given to that effect, and that nothing of the sort was pretended. He, nor any of his representatives, has ever to this day, asserted a claim to these lands under the deed for his separate debt, either as a mortgage or as an unconditional conveyance. On the contrary, the purchase of them under the partnership mortgage, was in direct disaffirmance of his supposed title to them on his separate account. What act has he done, then, in assertion of this particular claim, or what is there to account for his having done nothing? It is idle to assign *Trent's* poverty as a reason for the delay, when these very lands might have been got if the debt had not been paid. If, then, this conveyance was originally a mortgage, of which there is no room to doubt, the presumption of payment from lapse of time is overwhelming; and if, as is neither impossible nor improbable, these tracts were included in the partnership mortgage also, then there is nothing in the case to distinguish them from the others. Take, it however, that they were not so included, and we have the case of lands purchased on joint account, by one of two joint mortgagees, and sold by him, after having executed a deed of trust to his companion, from whom he detains his share of the price on the pretext that as the land was, in fact, not included in the mortgage, neither has a title. This would be a strange defence. Having purchased at their joint risk, they are jointly entitled to the profit, and that too, independently of any declaration of trust. What if the sheriff had sold to a stranger? He could not have set up want of consideration as a defence; and either mortgagee could have ruled the money into court, and taken his share of it. But the land itself, being taken in lieu of the price of it, is to be treated as money and subjected to the same rights. Had the defendants sold with general warranty, they would have been entitled to retain till they should be secured to the amount of their share of the risk from eviction, but no warranty is pretended: moreover, the title of *Trent's* heirs is barred by the statute of limitations.

There are, beside these, some other shades of difference between my view of the cause and that taken by the court; but what I have said, sufficiently indicates my reasons for thinking the verdict right on the merits.

SMITH, J. concurred with the chief justice in regard to the liability of Mrs. *Philips*; and with HUSTON J. as to the merits.

ROSS, J. concurred with HUSTON, J.

ROGERS, J. did not sit in the cause, having been of counsel with the defendants. Judgment set aside and a new trial ordered.



# RICHARD JOHNSTON *against* HENRY BRACKBILL.

## IN ERROR.

Where the issue joined was on the plea of a submission and an award, and the submission was general "of and concerning the differences depending between" the parties; an award setting forth that the arbitrators had examined *their several books of account*, and taken into consideration a judgment bond to the plaintiff from the defendant, and finding a particular sum due to the former *on that bond*; without determining how much, or whether any thing was due on the other subjects of difference submitted to, or examined by them, is not final, and therefore it is bad.

Where issue is joined *on this plea*, evidence of mistake and inadvertance in the arbitrators in making the award is inadmissible. But where such evidence is received under this plea, and the award is a nullity, the court will not reverse for the admission of such evidence.

Where it appears, by a calculation, that the jury did not allow credits, of which incompetent evidence was given; the judgment will not be reversed on a bill of exception to such evidence.

UPON a writ of error to the Common Pleas of Lancaster county, the case was thus:

*Henry Brackbill*, to April term, 1817, issued a *scire facias* to revive a judgment which he had obtained against *Richard Johnston*, the plaintiff in error, to January term, 1812.

On the 24th December, 1824, the defendant *Johnston*, put in this plea; "payment, under which he intends to give in evidence the award of referees, mutually chosen by the parties, by which all matters in this suit were settled;" the plaintiff replied, "*non solvi*," and issue was joined thereon.

And now, August 23d, 1825, the cause being reached, and before the jury were called, the defendant offered to add the plea of a submission of the cause of action, in this case, to arbitrators, and an award made in pursuance thereof; which the plaintiff objected to, and prayed the court to direct the plea so offered to be drawn up in form, which is accordingly done, and the counsel for the defendant moves that the same be added, which motion was objected to, and on argument allowed.

The defendant then pleaded that the plaintiff and defendant on the 22d day of March, 1821, submitted themselves, under the penalty of two thousand dollars each, to stand to the award of *David Witmer*, *John Hamilton*, and *George Hoffman*, "of and concerning the differences then in controversy between them," and that the said arbitrators, on the 30th April, 1821, awarded, "of and concerning the premises," a balance of one thousand three hundred and eighteen dollars and four cents, from the said *Richard*

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to the said *Henry*, "to be due upon the judgment bond which the said *Richard* had given to the said *Henry*;" and the defendant averred that the bond on which the original judgment was entered was the same bond, and that he had been, and still is, willing to stand to and abide the said award. To this plea the plaintiff replied that said arbitrators "did not make any such award of and concerning the said premises, in manner and form as the said *Richard* had in his plea alleged." These pleadings were formally drawn out and entered.

The cause being at issue, and the jury sworn, the plaintiffs having shown the original judgment rested; the defendant then gave in evidence the submission and award set forth in his plea.

The submission was in these words:

"Whereas, differences have arisen between *Henry Brackbill* and *Richard Johnston*, which are this day referred amicably by us unto *David Witmer*, *John Hamilton*, and *George Hoffman*, we the said parties do hereby bind ourselves, our heirs, executors and administrators, each unto the other, his heirs, executors and administrators or assigns, in the penal sum of two thousand dollars, lawful money of the United States, that we will stand to the award, or settlement that the said arbitrators shall make out under their hands."

The award was as follows:

"We the undersigned arbitrators amicably appointed by *Henry Brackbill* and *Richard Johnston*, to settle all matters in variance between the said parties do report, that after hearing the parties, examining their several book accounts, and also taking a judgment bond from said *Johnston* to *Brackbill* into consideration, we find a balance of thirteen hundred and eighteen dollars and four cents due from *Johnston* to *Brackbill*, on said bond."

The defendant having given this submission and award in evidence, the plaintiff offered to prove, that on the 1st June, 1815, he entered as surety of *Richard Johnston* the defendant, into a certain bond with him, to *John Neff*, for the payment of one hundred and twenty dollars with interest. And also, on the same day that he entered into another bond to *John Neff*, with the said *Johnston*, as surety for said *Richard*, for the payment of a like sum, which said sums, with their interest, he the plaintiff had to pay, and did pay to the said *Neff*, in discharge of the said bonds, on the default of payment by the said *Richard*, before the said submission and award: and that although it was admitted, by the said *Richard*, before the said referees, that said *Henry* had paid the said moneys for him, by inadvertence, and mistake, the said sums were not credited to the said *Henry* in the said award; which was not known to him till after the said award was made: which testimony was objected to by the defendant, and received by the court, and a bill of exceptions sealed.

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The defendant's counsel requested the court to charge the jury, "that the submission and award were a bar to the recovery of the plaintiff in the present action."

The court charged the jury, that the defendant had given no other evidence of payment than that which was proved by this award, and to the amount of the sum credited by the referees the defendant was entitled to a credit.

"But the plaintiff has proved that he as surety of *Richard Johnston*, joined with him in two bonds to *John Neff*, each for the sum of one hundred and twenty dollars, the amount of which two bonds he, *Henry Brackbill* settled with *Neff*; and it was offered to be proved that it was admitted by the said *Richard* before the referees, that *Brackbill* had paid the said monies for him, and that by inadvertence and mistake, the said sums were not credited to *Brackbill* in the award, which was not known to him till after the award was made. The question of fact for you to determine is—has this matter been proved? If it has been clearly made out, you will make the allowance claimed, but if it should appear to you, that *Brackbill* had an opportunity of proving the fact of these payments before these referees, and neglected it—if it does not clearly appear to you that the payment was expressly admitted by *Johnston*—and if it does not appear that there was a mistake, or inadvertence on the part of the referees; and that the award was made on the ground of want of proof of payment of these bonds; then *Brackbill* is bound by it, and he cannot have from you the allowance he claims in this action."

The court also charged the jury that the submission and an award were no bar to the plaintiff's recovery in the present action. Upon this charge the court sealed a bill of exceptions.

The jury found for the plaintiff one thousand six hundred and fifty-nine dollars and forty cents. By a calculation now made, this was ascertained to be the amount of the award with interest.

The plaintiff in error assigned for error.

1st. The admission of the evidence contained in the first bill of exceptions.

2d. That the court below should have answered the point submitted to them by the counsel of the plaintiff in error, in his favour.

3d. That the court erred in instructing the jury, that if the facts were clearly proved, they should make the allowance claimed in consequence of the alleged mistake of the arbitrators in not crediting the amount of the two bonds paid by *Brackbill* to *Neff*, in which he was surety for *Johnston*.

*Porter* for the plaintiff in error, contended that the issue was on the plea of *nul tiel record*, and the evidence offered and received,

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was to prove a mistake in making it, and a plain departure from the issue. 1 *Saunders*, 327, note, 1. 2 *Saunders*, 84, b. & c. *Kidd on awards*, 381. *Fisher v. Pascal*, 3 *Yeates*, 564.

On the plea of *non assumpsit*, to an action founded on the award of arbitrators, without notice of special matter, the defendant cannot give mistake of the arbitrators in evidence. *Taylor v. Coryell*, 12 *Serg. & Rawle*, 243.

Second error. The award is a bar to the plaintiff and his only remedy is upon the agreement of submission. 1 *Phil. Ev.* [305,] [242,] *Kidd on awards*, 381.

Third error. The award is conclusive upon the parties. 1 *Phil. Ev.* [73,] 305, 306. *Underhill v. Van Courtland*, 2 *John. Ch. Rep.* 339. *Todd v. Barlow*, 3 *John. Rep.* 367. To avoid it, there must be either fraud in the party, or misconduct in the arbitrators, which must be specially pleaded, or a notice of it given under a general plea. *Davis v. Harvard*, 15 *Serg. & Rawle*, 165. *Taylor v. Coryell*, 12 *Serg. & Rawle*, 243.

*Jenkins* and *Hopkins* for the defendants in error. The verdict by calculation is ascertained to be the amount of the award with interest. This the plaintiff in error admits to be due, and why therefore reverse the judgment. The admission of the evidence then is without prejudice to the plaintiff in error, and if there were error in it, this court will not reverse for an error which has done the party alleging it, no injury, *Collins v. Rush*, 7 *Serg. & Rawle*, 147. *Allen v. Rostain*, 11 *Serg. & Rawle*, 372--3. *Campbell v. Calhoun*, 1 *Penn. Rep.* 140, and the court will look through the whole record to ascertain if any injury has resulted to the party from such error.

The plea was improperly received, and therefore cannot effect the argument. The award was made in 1821, and the plea not put in until 1825, on the trial, and against the consent of the plaintiff. The plea was a plea *puis d'ancien continuance*, and ought not to have been received out of time.

It is here a plea without merits, and besides being out of time, it could not be put in without the payment of all costs up to the time it is put in; for it admits that all was right on the part of the plaintiff up to that time. *Hostetter v. Kaufman*, 11 *Serg. & Rawle*, 146.

But the lien of the plaintiff's judgment, and the judgment itself could not be destroyed by the award, without going farther, and proving satisfaction.

The award was no bar for two reasons. First. Because it was made on a plain mistake. Second. It was not an award in this action.

At law an award is conclusive, but in equity it is open to show fraud or mistake. We could not give notice of our ground of re-

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assistance of the award for it was not pleaded until the trial; and besides, such notice is required from the defendant, and never from the plaintiff.

But it is no award in this action; the submission does not state any action. It referred to "differences which had arisen;" but this judgment was not a difference. It had been ascertained at law, and the payments upon it were but a reduction of that sum.

The award, they contended, was not in this collateral way a legal defence, it was a mere equitable defence, of which the defendant had the full benefit.

*Buchanan*, for the plaintiff in error, in reply. The question is not whether thirteen hundred dollars are due to the plaintiff or not, but whether after a party has submitted his cause of action to arbitrators, he can, when an award has been made on the submission, proceed on the original cause of action. He denied that the plaintiff had an election to proceed on the judgment, or on the submission. His remedy is alone on the submission, and the award is the evidence of the extent of his claim; and a court of equity would enjoin him from proceeding on a judgment, if that was his cause of action, or if he brought suit on the original cause of action, he would be barred, upon the plea of the award; as that cause of action is wholly extinguished by the award.

The plea was properly put in, although that is not an open question here. It is not a *plea puis darien continuance*, but a plea to the further maintenance of the action. The latter is put in where something has occurred after suit brought, but before issue joined, upon which the defendant wishes to rely; the former on something occurring after issue joined. The first plea put in by the defendant, was a plea of payment, with a notice of his reliance upon the award, and the plea put in on the trial was putting into form, that which had been before informally pleaded.

The evidence received was clearly inadmissible. The issue joined was award or no award; and under this issue it was manifestly incompetent to prove that the award was made by mistake. If the award were made by mistake this may be shown, but it must be specially pleaded.

But it is said that no injury was done by this evidence, and to prove this, what is called arithmetical progression is resorted to, to show that the amount of the verdict consists with the evidence, independent of *this* testimony. It is not denied that the court will not reverse for error, where it is plain no injury was done.

But adopt the principle that you may go into the jury box, and by calculation ascertain upon what they decided, and you are at once at sea without a compass: and the sacred rules of the common

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law will be lost in a maze of conjecture, as to what influenced the decision of the jury.

The opinion of the court was delivered by

GIBSON, C. J.—The plaintiff having joined issue on the plea of a submission and an award, will fail if the award shown be valid. The defendant relies on strict rules of pleading, without regard to the obvious justice of the case, and is therefore to be held to strict rules of law. The submission was general, “of and concerning the differences then depending between them;” not of all matters in controversy between them in this, or any other action. The award sets forth, that after hearing the parties, examining their several books of account, and taking into consideration a judgment bond to the plaintiff from the defendant, the arbitrators find a particular sum due to the former on that bond, without determining how much, or whether any thing were due on the other subjects of difference submitted to, or examined by them. We may conjecture with a probable degree of certainty, that the sum awarded is the general balance; but that is not a necessary or even a natural conclusion. Else why refer it to this particular item of charge? The submission was not of the particular bond, but of the *differences* between the parties, and it seems from the introduction of their books of account, they had several. Now there is no severer rule than, that an award must be not only conveniently certain and mutual, but so final as to terminate all the differences submitted. I admit that this rule is relaxed here in some respects; but we must remember that we are here on rules of pleading, which require greater certainty than is necessary by our ordinary practice. Had the arbitrators awarded a general balance, we would be bound to suppose they had determined all the difference in controversy, and their award would have been mutual, final, and reasonably certain. But they have eluded this conclusion by specially awarding the balance of a particular item, without saying any thing of the rest: so that being bad in this respect they have made no award at all. It may be alleged that the defect, if any, appears on the face of the plea, and that the plaintiff ought therefore to have demurred. But it does not appear by the award pleaded, that more than one subject of difference was laid before the arbitrators, so that it would be impossible to say all had not been decided; while by the award given in evidence, it appears there were several. The evidence therefore, did not support the plea.

The award having been given in evidence, the plaintiff was allowed to prove that certain credits to which he supposed himself entitled, had been omitted by an oversight; and the court charged that an error by mere inadvertence of the arbitrators might still be corrected. Had the award been conclusive, there would have

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been error in the admission of the evidence, and the direction consequent on it. But it is not easy to see how a vicious award should have a controlling influence on the evidence under the plea of payment. But, putting that matter aside, it appears from the verdict itself, which is exactly for the sum awarded, with the intervening interest, that those credits were in fact rejected. It is said we cannot follow incompetent evidence, or a misdirection into the jury box to ascertain its operation. The law is clearly otherwise. In *Preston v. Harvey*, 2 *Hen. & Murf.* 55, and *Wolverton v. The Commonwealth*, 7 *Serg. & Rawle*, 273, an error in the admission of incompetent evidence was held to be cured by conclusive proof of the fact, on the ground that the previous evidence could not have had an influence on the verdict. So in *Faulcon v. Harris*, 2 *Hen. & Murf.* 550, the admission of incompetent evidence which appeared by the verdict to have been inoperative, was held to be immaterial. And in *Campbell's Executors v. Colhoun's Administrators*, 1 *Penn. Rep.* 140, it was held that a misdirection in point of law might be cured by a finding on a distinct ground of fact to which the rule laid down was inapplicable. The principle stated by the chief justice, in *Allen v. Rostain*, 11 *Serg. & Rawle*, 374, is founded in justice as well as authority. Our business is not with abstract principles, but injuries from the application of them. As therefore the error of the court in attempting to supply omissions in the award, did not vary the result, the judgment is unimpeachable.

Judgment affirmed.

JAMES JOHNSON, *against* MARY MATSON.

IN ERROR.

Where under proceedings in partition in the Orphans' Court to divide the lands of S. the same was appraised and taken by M. who had married one of the children of S. and who acknowledged recognizances to the other children for their shares. The wife of M. can claim nothing against her husband or a purchaser of his estate; but the undivided share which descended to her, and which remains specifically in land, after all the purposes of distribution have been answered.

This was an ejectment brought in the District Court of York county, by the defendant in error, to recover from *James Johnson*, one hundred and ninety-six acres of land. The facts were as follows: *James Sinclair*, the father of *Mary Matson*, died in 1807, seized in fee of two tracts of land, one of one hundred and ninety-three acres; the other the land in dispute. He left seven children, (of whom the plaintiff is one,) and the children of a deceased child. In 1811, application was made to the Orphans' Court to divide these two tracts, amongst the children of *Sinclair*, agreeably to the intestate laws, and in pursuance thereof the tract of one hundred and ninety-three acres, was valued at three thousand two hundred dollars, and was decreed by the said court to the eldest son; who gave security to the other heirs for their distributive shares. The tract of one hundred and ninety-six acres, the land in dispute, was valued at one thousand one hundred and twenty-seven dollars, and was decreed to *Adley Matson*, who had intermarried with the plaintiff, he entering into a recognizance to secure to each heir one hundred and forty dollars and fifty cents, the sum they were severally entitled to. In 1813, *Shenberger* obtained judgment against *Adley Matson*, on which the land decreed to him was sold by the sheriff to the defendant *Johnson*, for four hundred and fifty dollars, and a deed acknowledged January, 1816. At the time of the sale *Johnson*, the purchaser, held three judgments against *Matson*, amounting to six hundred and fifty dollars. *Matson* died in December, 1826. The court charged that the plaintiff was entitled to recover the whole tract and recommended a verdict accordingly.

Verdict and judgment for the plaintiff.

*Lewis and Barnitz*, for plaintiff in error.

The Orphans' Court had no power to concentrate the interest of the wife, but that interest remained in the land unaffected by the decree of the Orphans' Court vesting the estate of her father in her husband under the intestate law. The estate in one tract was decreed to him by the court, and it is only as to one-eighth part, (her proportion,) they take by descent, but of the other seven-eighths the husband was the purchaser when he entered into a recogni-



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zance to secure the shares of the other children. As to her interest in the other tract, that by the decree of the Orphans' Court was converted into personalty. All these facts being set forth in the records of the court, through which the title to the land sold was made, the plaintiff in error who was the purchaser, was necessarily cognizant of them. The court below gave judgment against the defendant for the whole of the land purchased, which was more than the wife would be entitled to, out of all the real estate of her father, the larger portion of which had been converted into personalty, and the right thereto clearly vested in the husband. *Kean v. Ridgeway*, 16 Serg. & Rawle, 60. *Stoolfoos v. Jenkins*, 8 Serg. & Rawle, 175. *Smith v. Scudder*, 11 Serg. & Rawle, 325.

*Evans*, contra.

*Mary Matson*, the plaintiff, claimed the whole tract, on the ground that her husband took in her right. The paying or securing to be paid, the shares of the other children, could not entitle him to the fee simple of the estate. He was a trustee for the wife in whom the fee simple vested, and his interest was but a life estate. If then he be received as a trustee to take the estate in trust for his wife, he would be a trustee to bind the same in fee simple by a recognizance in favour of the other heirs. That in this case *Adley Matson* took in right of his wife, and as it appeared of record, *Johnson* the purchaser at sheriff's sale had notice of it. *Blocker v. Cormony*, 1 Serg. & Rawle, 460. *Foglesonger v. Somerville*, 6 Serg. & Rawle, 167. *Stoolfoos v. Jenkins*, 8 Serg. & Rawle, 175.

The opinion of the court was delivered by

GIBSON, C. J.—The principles of this case have been already settled on terms so explicit as to occasion surprise at finding them misapprehended in the court below. A wife can claim nothing against her husband or a purchaser of his estate, but the undivided share which descended to her, and which remains specifically in land after all the purposes of distribution have been answered. Here she was permitted to recover all the land that was accepted by her husband at the valuation, because, at it was said, he had paid nothing for it, and was entitled to nothing more than his courtesy initiate, which determined at his death. But he acknowledged recognizances to the other children, which, if not paid may yet be recovered of his estate or of the land in the hands of the defendant. Even should their interest not be divested, what right can that give the plaintiff to any thing beyond her own share? In *Kean v. Ridgeway*, 16 Serg. & Rawle, 60, it was held that her portion of the whole estate is not concentrated in a particular part accepted by the husband; and there is no reason why it should be thus concentrated, where her whole portion has not been taken specifically in land. The doubt sometimes expressed of the principle of *Yoye v. Barnit*, seems to me to be without due consideration. Why should

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the price of a wife's land be exempt from her husband's marital rights, where transmutation has been the necessary consequence of a process of distribution? Equity insists on a provision for the wife, not in consequence of any imperfection in the husband's title to her personal estate, but as the price of its interposition in his favour. But where, as in the case of a recognizance to the wife, her money may be reached by an action at law, no chancellor would pretend that he is not both in equity and at law, the absolute owner of it; and to treat it as land, or follow it into land purchased with it, for the purpose of establishing a resulting trust in favour of the wife, would introduce an equity hitherto unknown to the English or the American courts. But even were there room to doubt the propriety of that decision on the ground of any admitted principle of equity, it has since entered into such a countless number of estates as a rule of property, as to render the mischief that would be produced by disturbing it now, incalculable. In the case at bar therefore, the plaintiff is entitled to recover only her purpart in the part taken by her husband, as it descended to her.

Judgment reversed, and a *reversé de novo* awarded.

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## SUSANNAH RICHWINE *against* WILLIAM HEIM.

### IN ERROR.

An assignment by a husband, under the insolvent laws, of his wife's chosen in action, defeats her right of survivorship, in case he dies before they are reduced into possession.

THIS case came before the court on a writ of error to the District court of York county, where judgment had been rendered for the defendant in error, on the following facts:

The father of the plaintiff by his will, proved in 1787, bequeathed to her certain sums of money, which he left as a charge on his real estate, (part whereof now belongs to the defendant,) and which were made payable to her at successive intervals of seven years, the last of which became due on the 7th March, 1827. In June, 1790, she married *John Richwine*, who afterwards in 1796, took the benefit of the insolvent laws, and assigned all his estate, real and personal, to trustees for the benefit of his creditors. The assignment embraced not only what was set out in the schedule annexed to his petition, but also all other estate that he was possessed of or entitled to, in right of his wife or otherwise. In 1822, *Richwine* died, at which time his trustees had received all the in-

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stalments due on the land, but that of March, 1827, to recover, which when it fell due suit was brought by his wife.

*Evans*, for the plaintiff in error.

The husband of the plaintiff having assigned under the insolvent laws, we contend that the legacy to the wife not reduced into possession survived to her. *Hammond's Eq. Dig.* 203, §11. 2 *Madox's Chancery*, 16. *Hartman v. Doudel*, 1 *Rawle*, 279. The assignment of an insolvent reserves a reversionary interest, and is not absolute but in the nature of a security. Choses in action of the wife not being reduced into possession in the life of the husband survive to her; and the assignment of them merely vests in the assignee, the same right the husband had and subject to the like contingency of surviving to the wife. We do not claim for the payments made before the husband's death.

*Barrett*, for the defendant in error.

The plaintiff below claimed the payments made in the lifetime of the husband. The cases referred to in England are under the statute of bankruptcy, in a system *sui generis*. In the earlier cases they held, there, that bankruptcy took away survivorship, but this was afterwards doubted. There too the principle prevails, when chancery has possession of a fund, for that court to require a provision for the wife, when application is made for that fund. Here no such jurisdiction exists. But this assignment is under an act of assembly, which requires every possible interest to be assigned. The husband may assign a possibility for a valuable consideration and this excludes the right of survivorship. In the case of *Hartman v. Doudel*, the assignment was as a collateral security. That case decides that the husband may assign the choses in action of his wife for a valuable consideration and bar her right of survivorship, but that a voluntary assignment would not have that effect. Here, however, the assignment was absolute, and for the payment of debts, which is a valuable consideration, and not as a collateral security.

*Lewis*, in reply.

The words of the assignment in this case, if they go beyond the law are inoperative. The act of assembly requires that he should assign his estate. What is his estate? His interest in this chose in action was a particular interest subject to the right of survivorship, and so it must be assigned. An assignment is a strict legal right, and derives no aid in England from any principle in equity. The case comes precisely within the principle in *Hartman v. Doudel*. The assignment was collateral to the debt which remained, and the creditors were not even parties to it. The right to imprison is collateral to the debt. And where an assignment is collateral to the debt, the wife's right of survivorship is not defeated. *Hartman v. Doudel*, 1 *Rawle*, 279.

(Susannah Richwine v. William Heim.)

The opinion of the court was delivered by

SMITH, J. (who after recapitulating the facts, continued.) The assignment was made in pursuance of the act of the 14th of February, 1730, entitled "An act for the relief of insolvent debtors, within the Province of Pennsylvania." 1 Sm. laws, 181. Had the husband assigned to the two creditors, who are named as his trustees, all his estate, in discharge of their particular debts, there would be no doubt of their right to the money in question. It would be a perversion of justice, then, to say that his assignment to them, in trust, for the benefit of all his creditors; an assignment without preference, is not equally effectual, in securing the amount to them all. If the assignment had been made, without regard to the act of assembly, it would have passed the absolute right to this money; and as there is nothing in the act, but what strengthens rather than diminishes the consideration, we are of opinion, that the plaintiff's right of survivorship, is defeated. The observations in the case of *Lodge v. Hamilton*, 2 Serg. & Rawle, 491, strongly fortify this conclusion. The judgment of the District Court must be affirmed.

Judgment affirmed.

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WILLIAM TYSON and others *against* THOMAS POLLOCK,  
who survived WILLIAM POLLOCK.

IN ERROR.

A. & Co. and B. & Co. contracted *jointly* to purchase from C. a quantity of wheat, for which they were to give the notes of certain banks, which were specified. A part of the wheat was delivered to A. & Co. and a part to B. & Co. without the knowledge of C., for which their respective receipts were taken. Afterwards A. & Co. gave drafts on E. at forty-five days, for the grain received by them; which the receipt stated would be considered as so much money, when paid. B & Co. also gave their draft at forty-five days on F. for the wheat they had received, in the acknowledgment of which it was set out, "that when paid it would be in full." On receiving these drafts, C. gave up the receipts which A. & Co. and B. & Co. had given for the grain.

*Held:* That by the acceptance of these bills, the *joint* contract of the partner firms, was not merged in their separate responsibility.

Each partner is separately the agent of the rest, with authority to pay the whole or any part of the debts, and payment by him is essentially payment on joint account.

THIS case came before the court on a writ of error to the District Court of York county, where judgment had been rendered for

(William Tyson and others v. Thomas Pollock, who survived William Pollock.)

the defendant in error who was there the plaintiff, on the following "special verdict."

The defendants, *Charles M. Poor, William Tyson and Nathan Tyson*, as *Tyson & Co.* and *Jesse McConky and Samuel Byrnes*, as *Byrnes & Co.* executed this contract,

"York Haven, 5th April, 1817.

These will certify that we have this day purchased of *W. & T. Pollock*, three thousand bushels wheat, at two dollars fifty cents per bushel, to be delivered on or before the 25th instant, if practicable, payable on delivery, or as soon thereafter as it may be called for in money of *Northumberland, Swatara, Harrisburg, York, Columbia, Lancaster or Baltimore banks*,

"*Tyson & Co.*

"For *Byrne & Co.*

"*Charles M. Poor.*"

The wheat therein mentioned was delivered agreeably thereto. It was forwarded by the plaintiff who resides on the *Susquehanna*, in Union county, in boats to the defendants' mills at York Haven, in York county, and there received by the defendants from the plaintiffs' boatmen, and divided equally by the two firms, in the absence of, and without the knowledge of the plaintiff or his partner; and the two firms severally delivered to the boatmen their respective receipts for the part by them severally received as aforesaid, which receipts were delivered to the plaintiff by the boatmen, and by the plaintiff afterwards delivered to the defendants, on their executing the drafts hereinafter mentioned. After the delivery of the wheat as aforesaid, drafts were given to the plaintiff by *Byrnes & Co.* on *Samuel Byrnes* of Baltimore, dated York Haven, 10th May, 1817, payable forty-five days after date—two of them for two thousand dollars each, and two for three hundred dollars each, (which said drafts were all marked "accepted, *S. Byrnes*,") for the amount of wheat which that firm had received as aforesaid, and this receipt given by plaintiff:

"Received, York Haven, 10th May, 1817, of *Byrnes & Co.* four drafts, two of two thousand dollars each, and two of three hundred dollars each, making four thousand six hundred dollars; which when paid will be considered as such—deducting the discount—the drafts at forty-five days.

"*Wm. & Thos. Pollock.*"

A draft also was given by *Tyson & Co.* for the amount of wheat which that firm received as aforesaid, on *W. & N. Tyson*, of Baltimore, dated 11th May, 1817, at forty-five days, in favour of the plaintiffs, for three thousand six hundred and thirty-five dollars and eighty-seven cents, which was indorsed, accepted and paid, for which a receipt was given by the plaintiffs as follows:

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"Columbia, 11th May, 1817. Received of *Tyson & Co.* (mentioning the draft,) which when paid will be in full to this day, (the discount on the above deducted.) "*Wm. & Thos. Pollock.*"

The drafts of *Byrnes & Co.* were not paid, but protested and duly tendered to the defendants.

The mills of defendants, at York Haven, were owned separately, not jointly, one by *Tyson & Co.* the other by *Byrnes & Co.*

*Barnitz*; for the plaintiff in error.

Although the original contract may have been joint, yet as the wheat was delivered to each firm according to its interest, separate settlements made, and separate drafts taken from each, it was executed as several contracts, and all joint liability was gone. By the agreement the wheat was to be paid for on delivery—the drafts were a payment. Each firm was in full credit and perfectly solvent when the payments should have been made: but the plaintiffs taking drafts without the privity of the different firms, went out of the contract, and thus jeopardized the interests of the defendants. The receipt given "which when paid will be in full," meant that when the draft was paid, it would be in full of all liability of the drawers. The liability on the original contract would only exist while the contract was executory: but the delivery of the wheat, and adopting a mode of payment which separated the rights of the defendants, a different contract was executed, and the plaintiffs have their recourse only upon the mode accepted by them: the same as where articles of agreement are entered into for the sale of land, and afterwards a deed is made and bonds are given; the liability is then on the bonds. Since the case of *Milligan v. Brown*, the law is settled that where a receipt is given it discharges the obligor, and a release under seal is not required to produce this effect. 1 *Rawle* 391.

*Lewis*, for the defendant in error.

The money was to be paid on the delivery of the wheat, and the credit given was for the benefit of the defendants, and not of the plaintiff *Pollock*. The giving of the drafts alone would not extinguish the contract; but by the receipt of the 10th May, 1817, there was an express stipulation it should not be extinguished. No fair inference can be drawn from the receipt to *Tyson & Co.* "which when paid will be in full," that a new contract was entered into; on the contrary it is all one transaction, and shows the agreement was that the plaintiff would take this draft, which with the drafts taken the day before, would be in full. The drafts and receipts refer to the original contract; and the receipts show that the drafts were not taken as payment, but refer to the contract, and were to be in full of that and not of *Tyson's* part. There is a difference between the receipts here, and in the case of *Milligan v. Brown*,

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1 *Rawle* 391, there the receipt was in full of the proportion of one of the joint debtors to whom it was given. This court cannot infer from the papers, an intention or agreement to discharge one of the parties to the original contract: clear proof of such fact is requisite. The inference is the other way; for the receipts are carefully drawn to prevent such a conclusion. Taking a security of the same grade, or as collateral to a contract is no extinguishment.

*Durkee*, on the same side.

This contract is joint, the violence necessary to sever it must destroy it. There is no equity in the case, the defendants being all principals; moreover the credit given being a benefit to all, is no ground of equitable defence. They are all a firm, and extension of credit to any one of them, is a credit to all. It cannot be pretended that where one partner gives his note or draft, payable at a future day, and takes a receipt which when paid will be in full; that that extinguishes the debt of the firm, because time was given during which suit could not be maintained on it. In case of sureties it might be so. But such transaction leaves the firm and every member liable on the original contract, which they have neither satisfied in law or equity. Suppose instead of drafts, counterfeit money had been given by *Byrnes & Co.* to the *Pollocks*, and the next day *Tyson & Co.* paid them the balance, and took their receipt in full; could it be pretended, upon a suit brought to recover the amount of this spurious money, that such a receipt, or had it been a release, would be a defence? It is true that where one of two joint debtors is discharged by the obligor it is the discharge of both: but there must be an intention evidenced by the discharge to produce such effect. The transaction with *Tyson & Co.* bears no resemblance to that with *Watson*, in *Milligan v. Brown*, 1 *Rawle*, 391. Unless the receipt operates to discharge *Tyson*, his defence fails. In *Milligan v. Brown*, *Watson* agrees to pay two thousand dollars, expressly in exoneration of his liability. This was a turning point in the cause and is of the very essence of it. The effect of this agreement was to discharge the other defendants, and this was not affected by the intention of the plaintiff to hold them liable. It is also necessary that the defendants should establish that the drafts were accepted in satisfaction of the part of *Tyson & Co.* this is not done by the special verdict, and therefore cannot be inferred. The receipt should say in so many words that the drafts were so taken, or it does not import it.

*Buchanan*, in reply.

There can be no doubt of the import of the receipt to *Tyson & Co.* fraud or mistake is not pretended. It is a receipt in full, without limitation, and manifests the intention, upon the payment of the amount for the wheat received by *Tyson & Co.* to discharge them from all liability. In the case of *Milligan v. Brown*, the

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execution was issued upon a debt due, the receipt was taken in terms not so strong as in the receipt here, and it was expressly proved that there was no intention to discharge *Brown*: yet the law discharged him. Here also, it is not a person standing in the relation of *Watson*, but the party himself to whom the receipt was given, whilst his contract was executory.

The contract in its inception was joint, but was afterwards severed by the parties as is conclusively shown by the receipt to *Tyson & Co.* In the same manner as if A. and B. buy six horses for six hundred dollars, and the vendor takes their separate notes for three hundred dollars each: can it be supposed that in the event of the failure to pay, by one of the vendees, the liability of the other on the original contract would remain.

The wheat was divided, and separate receipts taken by the plaintiffs, who were to receive their pay in the money specified, instead of which they took the drafts of the defendants. The several receipts which had been taken for the wheat, were delivered up to the defendants respectively: they were the only evidence to charge them under this contract. The credit of forty-five days to *Byrnes & Co.* is a matter with which *Tyson & Co.* have nothing to do; it was given without their consent; they therefore very properly demanded of the *Pollocks* a receipt in full on the payment of their proportion. A severance was effected by the plaintiffs accepting negotiable security from *Byrnes & Co.* one day, and from *Tyson & Co.* the next, and the intention to sever is evidenced by the receipt in full. There would be no equity or justice in permitting the plaintiffs after giving *Byrnes & Co.* a credit of forty-five days, in which time they became insolvent, to recur to the original contract and revive the liability of *Tyson & Co.*

The opinion of the court was delivered by

GIBSON, C. J.—That the purchase was originally on separate account, has not been pretended at the bar. It was made by a *partnership* constituted not of individuals but of firms, and limited to the act of purchasing only. The original contract, then, being joint, binds both firms, unless it has been satisfied, or severed by substituting their several for their joint liability. I lay out of the case as a matter with which the vendors had nothing to do, the separate receipt by each firm, of its share of the purchased article; a separation of their interests by the partners themselves, being consistent with the contract of sale as well as with the object of the partnership. The first question then is, whether by the acceptance of bills drawn by each of the partner firms at York Haven, on its parent house at Baltimore, the joint contract was merged in their separate responsibility. By the terms of the sale, payment was to



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be made, at the delivery of the article or on demand, in the notes of particular banks specified in the memorandum. At the time of delivery, separate receipts were given to the vendors, which they afterwards delivered up on receiving the bills on Baltimore. For these bills they gave to *Byrnes & Co.* a written acknowledgment of payment WHEN THE CONTENTS SHOULD BE RECEIVED; and to *Tyson & Co.* on the following day, a similar acknowledgment of payment in FULL, on the same condition. The transaction, therefore, was evidently a mode of payment by the partnership, and if so, it can have no more effect in producing a severance of any unsatisfied joint responsibility, than if the partnership had paid in the bills of any third persons of which it had accidentally become the holder. The bills of *Byrnes & Co.* can by no fair construction be considered as any thing else than payment *pro tanto* of the joint debts; and the bills of *Tyson & Co.* for the balance, which were agreed to be in full when they should be paid, clearly shows that it was so considered by the parties themselves. The difference in the terms of the receipts is remarkable; and I am unable to perceive how the omission to specify in the first also, that payment of the bills for which it was given should be in full, can be referred to any thing but an understanding that it should be in part, and consequently in part of the joint debt, as it could not be otherwise than in full if made on separate account. There is therefore, positive evidence on the face of the papers, that no severance was intended. But even without this, why should the separate acceptance of bills from each of two joint debtors, dissolve their joint liability more than would the separate acceptance of counterfeit bank notes or coin? All that the creditor has a right to require, is payment in fact, for whether joint or several can make no difference to him. Each partner is separately the agent of all the others, with authority to pay the whole or any part of the debts; and payment by him is essentially payment on joint account; so that the acceptance of securities from the individual partner does not necessarily or even naturally imply a relinquishment of any right against the partnership. Why then should the creditor be prejudiced in his relations with the partnership, by having accepted what he had no right to refuse? I take it, the responsibility of the partnership was not relinquished by it, unless the naked acceptance of the bills were satisfaction in law, without regard to the question of severance in fact, and this I proceed to consider.

In relation to the partnership, each of the partner firms may be treated as a stranger capable of dealing with it in the character of debtor or creditor; and as by the contract of sale, the wheat was to be paid for in the notes of particular banks, the subsequent acceptance of bills drawn by the partner firms, was payment in the bills of a stranger, of a *precedent* debt. On no other hypothesis

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could there be the shadow of a defence; for as one simple contract will not merge in another, it has invariably been held that the debtor's own bill or note for the price of goods sold, will not extinguish the original liability. *Ld. Raym.* 1430. 2 *Str.* 1218. *Willes*, 406. It merely operates as an extension of credit, and prevents a recurrence to the original contract of sale before the bill or note has come to maturity. 1 *Esp.* 3. We have then payment of a precedent debt in the bills of a third person, which has been universally held since *Clark v. Munden*, 1 *Salk.* 124, not to be absolute satisfaction, although it is otherwise where such payment has been in pursuance of the original bargain. I feel no disposition to review the authorities, but I may safely affirm that no case can be found in which any other doctrine was ever held. In *Sheely v. Mandeville*, 6 *Cranch*, 264, the acceptance of a bill was barely held to be a sufficient consideration for an agreement to discharge the precedent debt; which, when dependent on facts and circumstances, is a subject for the consideration of a jury. In *Arnold v. Camp*, 12 *Johns. R.* 409, acceptance of the separate note of one of the partners, was inferred to be satisfaction only from the fact that the partnership note was given up, a circumstance that does not enter into the case here. There are in fact no circumstances to take it out of the general rule, but enough to rebut a legal implication of satisfaction, even were the rule different. It would be decisive in any state of the law, that the parties themselves expressly agreed to take the bills as satisfaction only when they should be paid.

In this aspect, the authority of *Milliken v. Brown*, 1 *Rawle*, 391, makes the defendant's case neither better nor worse. If by the terms of the receipt given to *Tyson & Co.* the original contract were severed, or to be discharged by payment of that bill only, then *Tyson & Co.* would be exonerated, both jointly and separately, independently of the rule which gives one joint debtor the benefit of a release intended only for the other; and although the consequences might be important to *Byrnes & Co.* they could not add to the defence of *Tyson & Co.* which would be complete of itself. An absolute discharge of one of the debtors, is a postulate of the argument, which being once granted, makes an end of the question of joint liability, without regard to the question of liability by the other in a separate action. It seems to me that neither of these firms was discharged from the original contract, and that in every point of view, the cause is with the plaintiff.

SMITH, J.—Admitting the contract between the firm of *Tyson & Co.* and *Byrnes & Co.* and the Messrs. *Pollocks*, to be joint, (which however, might be doubted, were it not, that the parties had themselves admitted it to be so,) it does appear to me, that by the subsequent acts of the parties, it was severed, and the firm of *Tyson*

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& Co. discharged from the performance of, or all liability on the same. The wheat was divided between *Tyson & Co.* and *Byrnes & Co.* and *W. and T. Pollock* accepted, on the 11th of May, 1817, from *Tyson & Co.* for their part of the wheat, a draft on *W. and N. Tyson*, of Baltimore, for three thousand six hundred and thirty-five dollars and eighty-seven cents, and receipted for the same, "as in full to that day." At maturity the draft was paid. On the day before, (the 10th of May, 1817,) the plaintiffs had received, four drafts from *Byrnes & Co.* on *Samuel Byrnes* of Baltimore, for four thousand six hundred dollars, for their part of the wheat, which last mentioned drafts were not paid. About five years and more after all this, the Messrs. *Pollocks* bring this suit to recover on the contract of the 5th of April, 1817, from *Tyson & Co.* the amount of the draft received by them on *Samuel Byrnes*. And for this sum and interest, amounting to six thousand five hundred and twenty-five dollars, the court below rendered judgment, being for the wheat received by *Byrnes & Co.* and of which *Tyson & Co.* did not receive a grain. These circumstances go to show, that the Messrs. *Pollocks* looked to each firm, for the amount of wheat received by them respectively, after the contract had been made, and discharged them from their original joint liability. I am, therefore, of the opinion, that the judgment should be reversed. A majority of this court, however, are of a different opinion, and the judgment must therefore be affirmed.

Judgment affirmed.

Ross, J. concurred with SMITH, J.

JESSE SIDWELL *against* ROBERT and JAMES EVANS.

IN ERROR.

An agreement to forbear to sue for a *reasonable* time, is a consideration certain enough, upon which to sustain an action

A judge cannot be required to give a *legal* construction to the words of a witness, and say whether in point of *law* they sustain the allegation in point of *fact*. The construction of written evidence is for the court, and of parol evidence for the jury; and an admixture of parol with written evidence, draws the whole to the jury.

Whether a particular cause of action be proper for a *statement*, or whether the statement contains any cause of action; or whether a valid consideration be laid, are points that might be mooted on a motion in arrest of judgment: but they are matters with which the jury have nothing to do.

A plaintiff who states his case more particularly than is necessary, is not bound to the strict proof of circumstances, merely because they have been unnecessarily set out.

Municipal law is a matter of compact, and as such the construction of foreign statutes, as in the case of any other written compact, belongs to the court; and there is no distinction in this respect, between the written and unwritten law.

WRIT of error to the District Court for the city and county of Lancaster.

In the court below *Robert* and *James Evans* were plaintiffs, and filed the following statement, which contains all the facts of the case.

"That *Joseph Sidwell* and *Levi Sidwell*, (brothers of the said *Jesse Sidwell*,) were indebted to *Robert* and *James Evans*, assignees of *Abner Reynolds* and *Lewis Reynolds*, in the sum of four thousand one hundred dollars, the payment whereof was secured by a mortgage, and ten joint and several obligations, bearing date the 21st day of January, 1817, being part of the consideration money of a tract of land sold by the said *Abner* and *Lewis Reynolds*, to the said *Joseph* and *Levi Sidwell*, which said mortgage and bonds were afterwards, to wit, on the 2d day of July, 1817, assigned for full value to the said *Robert* and *James Evans*; and farther, that the said *Jesse Sidwell*, afterwards, to wit, the 30th day of May, 1820, purchased part of said land from his brother *Joseph Sidwell*, and at the same time executed a bond of indemnity to his said brother *Joseph*, in the penalty of six thousand dollars, conditioned, that he, *Jesse Sidwell*, would assume, and take upon himself, the payment of the said mortgage and bonds, and indemnify, and keep harmless the said *Joseph*, from the payment thereof:—and further, that afterwards, to wit, on or about the 20th day of September, in the year of our Lord, one thousand eight hundred and twenty-two, at the city and county of Lancaster, in a conversation then and there had, and held, between the said *Robert* and *James Evans*, and the said *Jesse*

Pen. & W.
1pw388
188 555
1pw388
140 419

1 PW 888
27 SC * 78

1pw388
225 *230
133SC* 73

(*Jesse Sidwell v. Robert and James Evans.*)

*Sidwell*, of and concerning the said mortgage and bonds, so as aforesaid given for the purchase money of the said land, he, the said *Jesse Sidwell*, then and there said, that he considered himself as stepping into *Joseph Sidwell's* shoes, and that he considered himself equally bound, as he, *Joseph*, had been, for the payment of the said money; and then and there, in consideration of the premises to wit, that he had stepped into *Joseph's* place, assumed payment, and promised to keep him harmless; and, also, in consideration that the said *Robert* and *James Evans* would wait a while, and give reasonable time to him the said *Jesse*, and forbear to sue the said *Joseph* and *Levi Sidwell*, for the said sums of money, so as aforesaid secured by the said mortgage and bonds, he, the said *Jesse Sidwell*, at his own special instance, *undertook and then and there promised* to pay the said *Robert* and *James Evans*, the said *four thousand one hundred dollars*.

"And the said *Robert* and *James* aver, that they did wait and give reasonable time to the said *Jesse*, and forbear to sue the said *Joseph* and *Levi* for the said money, upon the verbal promise and undertaking of said *Jesse*, made and accepted as aforesaid, and of which he had notice.

"And the said *Robert* and *James* further say, that they repeatedly offered, and are still ready and willing to transfer the said mortgage and bonds to the said *Jesse*, on his paying the said money; and that they have repeatedly requested him to pay, which he refused, and still refuses to do—the plaintiffs therefore claim of him, on his said verbal promise, the said debt of four thousand one hundred dollars, and interest thereon, from the said 20th of September, 1822, as justly due them."

The only evidence to support the promise, as stated, is contained in the deposition of *William Brown*, of which the following is the material part.

"In 1821 or 22, I was at Lancaster, in the store of *Robert* and *James Evans*, they were talking with *Jesse Sidwell* about paying for the land *Abner* and *Lewis Reynolds* sold *Levi* and *Joseph Sidwell*, he (*Jesse Sidwell*,) said he had bought out *Joseph's* share of the land and that he considered himself as stepping into *Joseph's* shoes, and that he considered himself equally bound as he had been for the payment of the money, and if they would wait a while, and not push his brother *Levi*, he would pay them honestly—both of the *Evans'* were there; they were talking of land sold by *Abner* and *Lewis Reynolds* to *Levi* and *Joseph Sidwell*. I understood by *Jesse Sidwell's* talk, he had bought a part of the land, or rather *Joseph's* undivided part."

Exceptions were taken to the opinion of the court, in answer to several points put by defendant's counsel, and which were assigned here as error: and which sufficiently appear in the opinion of the court.

(Jesse Sidwell v. Robert and James Evans.)

*Rogers and J. Hopkins, for plaintiff in error.**Buchanan and Jenkins, for defendants in error.*

The opinion of the court was delivered by

GIBSON, C. J.—The mischief produced by the want of a provision in our act of assembly similar to that in the statute of frauds, by which a parol promise to pay the debt of another is void, has induced the courts to lean against a recovery wherever the precise terms of the promise are not explicitly shown by clear and satisfactory proof; and were this case before us on a motion for a new trial, I would readily agree to send it to another jury. But on a bill of exceptions where we have no right to judge of the quantum of the proof, our business is not to correct the errors of the jury, and make a bad precedent, because the case is a hard one. Did the judge plainly misdirect the jury, or omit any proper direction which he was desired to give? The defendant requested him to charge “that the deposition of *William Brown*, given in evidence by the plaintiffs, contains no cause of action; and that, as that is the only evidence of any cause of action on the part of the plaintiffs, they cannot recover:” and this was declined.

On this part of the case only, have I entertained a doubt. The witness testified that the defendant in conversation with the plaintiffs, agreed that “if they would wait a *while*, and not push his brother *Levi*, he would pay them honestly.” Undoubtedly to wait a while, and not to push *Levi*, were both efficient causes of the promise; and neither being idle or frivolous, the insufficiency of either as a separate consideration would be fatal. It is well settled that a general forbearance is to be intended a perpetual forbearance; but how far a forbearance not perpetual, but for an unspecified time is a valid consideration, is not so clear. It seems to be agreed, there must be a substantial suspension of the right to sue; and therefore an agreement to forbear *per breve*; or *paululum tempus*; or *pro aliquo parvo tempore*; or even *pro aliquo tempore*; which resembles the case at bar, is insufficient, because such an agreement is so uncertain in its terms as not to stand in the way of a suit the next moment. 1 *Com. Dig.* 196. But in all these instances the question stood on the pleadings, and the extent and meaning of the words were to be determined by the court: here they were for the jury. Forbearance for a *reasonable* time is clearly certain enough; and being so laid, it is said the judge at *Nisi Prius*, shall be judge of that, or leave it to the jury on the circumstances, (*id.*) Take it, then, that the plaintiff had so laid his case in a declaration, (and the mode of pleading directed by the legislature, will surely not affect the case as it stands on the evidence,) could the judge have been required to give a *legal* construction to the words of the witness as if they stood in a deed or a will, and say whether in point

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of law they sustained the allegation in point of fact? That the construction of written evidence is for the court, and of parol evidence for the jury—and that an admixture of parol with written evidence draws the whole to the jury, are principles which appear every where in our books; particularly in *Welsh v. Dunsar*, 3 Bin. 377. *Denison v. Wurtz*, 7 Serg. & Rawle, 372. *Moore v. Miller*, 4 Serg. & Rawle, 279. *Watson v. Blaine*, 12 Serg. & Rawle, 131. *Overton v. Tracy*, 14 Serg. & Rawle, 311. *Brown v. Campbell*, 1 Serg. & Rawle, 176. A judge is not bound to give an opinion on facts; or to say what the law is on the whole evidence: he may advise, but if he directs the jury to find in a particular way, it is error. *Galbraith v. Black*, 4 Serg. & Rawle, 210. *White v. Kyle*, 1 Serg. & Rawle, 515. *Jones v. Wilder*, 8 Serg. & Rawle, 150. In *Sampson v. Sampson*, 4 Serg. & Rawle, 329, which would be in principle the case at bar, the judgment was reversed because the judge concluded by saying that the evidence was “very loose—too loose to entitle the plaintiff to a verdict.” I am aware that the propriety of this decision has been doubted by the profession; not however, because a binding direction on a question of fact, is not error, (for no lawyer ever doubted that,) but because it has been thought that nothing in the expressions of the judge ought to have induced a suspicion that he meant to take the cause from the jury. It is clear, therefore, not only that the judge was not only free to decline the directions prayed for here, but bound not to give it. The meaning of the parties as expressed by themselves and detailed by the witness, was exclusively for the jury who alone are competent, in legal estimation, to the construction of words spoken; and perhaps there was enough even in point of reason to warrant the verdict. But it is said there is positive error in the direction obtained by the plaintiffs, that “the jury must decide from the testimony in the cause. If they believe from that testimony that the defendant agreed for the consideration set forth in his statement, to pay the whole amount of the mortgage, being the sum of four thousand one hundred dollars, as the plaintiffs have alleged, then such agreement constituted a valid contract; and if the plaintiffs have performed the consideration, they are entitled to recover the amount: otherwise not.” Who can doubt it? The direction is in guarded conformity to the rights of the jury over the facts. But it is said that it was so ambiguous as to authorise a verdict for the amount of the mortgage, although all the instalments were not due when suit was brought. But the propriety of such a verdict would depend on the terms of the promise, which might be to pay even before the original debt should be due. But taking for granted that the judge might have directed the contrary as matter of law, was he bound to go beyond the proposition submitted, and present the case in every aspect of which it was susceptible on the evidence? If such were the rule no judgment would ever be affirmed; for there are few judges, in courts of error, whose inge-

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nuity would not suggest something in addition, that might have been appropriately said. It has, however, been determined by this court, when its vision in the inspection of error was certainly not dull, that a judgment is not to be reversed because the judge has not made ALL the remarks of which the nature of the case may admit. *Lilly v. Paschall's executors*, 2 Serg. & Rawle, 394. But the truth is, that although the judge might have advised a verdict for no more than the amount of the instalments due, or for the defendant generally, it would have been error to direct it; the terms of the promise, as well as performance of the consideration, presenting questions which were purely for the jury.

Whether this particular cause of action be proper for a statement, or whether the statement contains any cause of action, or whether a valid consideration were laid, are points that might be mooted on a motion in arrest of judgment, but they are obviously matters with which the jury had nothing to do.

If a plaintiff, having stated his case more particularly than was necessary, is bound to prove it strictly as stated, the legislature has attempted in vain to guard against the common law mischief of variance between the *allegatu* and the *probata*, for which many a meritorious plaintiff was turned out of court. The statement act which was produced by the inconvenience of strict pleading has always been liberally construed in suppression of the mischief, and advancement of the remedy; as in *Boyd v. Gordon*, 6 Serg. & Rawle, 53, and *Riddle v. Stevens*, 2 Serg. & Rawle, 537, where an averment of performance of previous conditions was held to be unnecessary. Little would be gained if a party were held to strict proof of circumstances, merely because they had been unnecessarily set out. Even at the common law, an immaterial averment, which may be separated from the principal fact without prejudice to the cause of action, while a sufficient allegation is still left, requires no proof. *Starkie's Ev.* pt. IV. 347-8-9. Here in addition to the date of the promise and the amount claimed, which is all the act requires, the plaintiff set forth his supplementary statement, various unnecessary details which may be struck out leaving a distinct substantive cause of action; and as the averments about the mortgage were immaterial they might, consistently with the nicest principles of the common law, be disregarded. But there was another statement filed, in which these unnecessary details were omitted; and why might not the plaintiffs recover on that, as on a particular count in a declaration? It was not withdrawn when the second was filed, and the plea expressly put it in issue; why, therefore, shall not the second be considered only as an additional count? If a plaintiff may not state his case in several ways to give him the benefit of the chances afforded by the evidence, and is nevertheless to be held to the strictness of common law proof, his condition is worse than it was before the legislature interfered to protect him.



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A promise in consideration of forbearance is undoubtedly not binding, if there were originally no cause of action. But as the plaintiffs were entitled to sue the Messrs. *Sidwells* as assignees of their bonds to the Messrs. *Reynolds*, there was a sufficient liability, independent of the assignment of the mortgage, which, however, being proved at common law, might well go to the jury for what it was worth. The defendant will, at all events, have the benefit of it as a security, as amply, as it could be enjoyed by the plaintiffs or the Messrs. *Reynolds*, whom the court of chancery in Maryland would doubtless compel to assign to him, if the assignment to the plaintiffs were invalid. I mention this part of the case for the opportunity which it presents, (the point having been incidentally mentioned in the argument,) of correcting an error into which I fell, in *Mullikin v. Aughinbaugh*, 1 *Penn. Rep.* 125, by asserting that the construction, as well as the existence of foreign laws, is for a jury and not for the court. Municipal law is a matter of compact, and as such, the construction of foreign statutes, as in the case of any other written compact, belongs to the court. A plausible distinction might be taken in this respect, between the written and the unwritten law, which necessarily rests on parol; but it seems to have been disregarded in *Mogson v. Fabrigas*, *Comp.* 174. *Dougherty v. Snyder*, 15 *Serg. & Rawle*, 86. *Consequa v. Willing*, 1 *Peters*, C. C. R. 225. *Robinson v. Clifford*, 1 *Wash. C. C. R.* 1. and *Selons v. Delamare Ins. Co.* *id.* 175—a weight of authority more than sufficient to bear down any argument that could be raised on a mere theoretic foundation.

The remaining point which regards the supposed recovery of more than was due at the institution of the suit, is already disposed of. The sum to be recovered depended on the nature of the promise which was to be ascertained by the jury. If there was any legal impediment to a recovery of the whole, it was the business of the defendant to point it out and desire the benefit of it, instead of which he put the whole to the court as an unmixed matter of law. The terms of the promise are undoubtedly so uncertain and imperfectly stated by the witness, as to render a recovery on it exceedingly dangerous; but having no discretion, we cannot reverse for an insufficiency of the evidence, and we discern no misdirection in point of law.

Judgment affirmed.

ROGERS, J. dissented.

HUSTON and SMITH, Justices, not having heard the argument, gave no opinion.

**CASES**  
**IN**  
**THE SUPREME COURT**  
**OF**  
**PENNSYLVANIA.**

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MIDDLE DISTRICT—JUNE TERM, 1830.

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**THOMAS INGHAM** and others, heirs of **JOSEPH INGHAM**, deceased, against **MASON CRARY** and **NATHAN BEACH**.

A parol gift of a lot of ground by a father to his married daughter, accompanied by possession and valuable improvements made by the husband at his own expense, vests in him no estate in addition to the freehold which the law allows him in right of his wife.

It is competent to give evidence of what was said previously to the execution of a deed, in order to establish the fact that the grantee received the deed in trust for another.

A certified copy of the docket entry of a suit cannot be received to establish the existence of a former suit pending for the same cause; and if received, the error will not be cured by the instruction of the court in their charge to the jury, to disregard it.

Writ of error to the Common Pleas of Luzerne county.

This was an action of ejectment brought by *Joseph Ingham* in his life time, against *Mason Crary*, for a house and lot in the borough of Wilkesbarre. *Nathan Beach* was, on motion, admitted to be a co-defendant, being the landlord of *Mason Crary*.

The evidence of the plaintiff's title was, 29th May, 1805, patent to *Jesse Fell*, for five acres and one hundred and fifty-one perches, including the lot in dispute. 3d August, 1805, deed *Jesse Fell* and wife to *Jonas Ingham*, for the lot in dispute; 19th July, 1819, deed, *Jonas Ingham* to *Charles Kinsey*; 6th September, 1821, deed, *Charles Kinsey* to *Joseph Ingham*.

*Ethan Baldwin*, Esq. was then called as a witness by the plaintiff, to testify, that an erasure, which appeared in the deed of 19th July, 1819, of *Ingham* to *Kinsey*, was made before its execution; and upon his cross examination said, in substance, that that deed was made for the purpose of giving to *Charles Kinsey*, who was then a citizen of New Jersey, colour of title to the lot in dispute,

(*Thomas Ingham and others, heirs of Joseph Ingham, deceased, v. Mason Crary and Nathan Beach.*)

so as to enable him to maintain an ejectment in the Circuit Court of the United States. The defendants then proposed to ask the witness, whether he did not then receive directions to bring a suit in that court, and what he did in pursuance of those directions. To which the plaintiff objected, that they could not prove the existence of a suit by parol: the court overruled the objection, and sealed a bill of exceptions at the request of the plaintiff.

The witness then, in substance said, that he had brought an ejectment in the Circuit Court in the name of *Charles Kinsey*, for the lot in controversy.

The defendants then offered in evidence, a certified copy of the "docket entries" of the suit brought in the Circuit Court of the United States, for the same lot, to October session, 1819. To which the plaintiff objected, that it did not purport to be an entire copy of the record. The objection was overruled and the paper admitted, to which the plaintiff excepted.

The defendants then offered and stated the testimony of *Jesse Fell*, to which the plaintiff objected, but the court admitted the evidence, and sealed a bill at the request of plaintiff.

The witness then said: "*Mrs. Ingham* the wife of *Jonas Ingham*, about 1804, called on me and said, that she had a legacy left her, which she wished to lay out for her daughter *Mrs. Perry*, and applied to me to buy the lot in dispute. We agreed upon the price, two hundred pounds, and the deed was to be made whenever a release of the lot could be obtained from a certain mortgage upon it and other lots. The release was obtained. *Jonas Ingham* was not present when the agreement was made with *Mrs. Ingham*; but he and I executed the agreement some time afterwards according to the terms which she and I made. It was to be purchased for *Mrs. Perry*. The purchase money was paid with the money of *Mrs. Ingham* by the hand of *Benjamin Perry*, the husband of *Mrs. Perry*. I had expected the deed was to be made to *Mr. Perry* or his wife. *Jonas Ingham* brought to me the release from the mortgage; I then asked him in whose name the deed was to be made, he said in his own name: he did not say then it was for *Mrs. Perry*; but he did say that *Perry* was trading pretty largely, and he did not know how things might turn out, or something to this effect. *Perry* had his goods in the shop on the lot when the deed was made by me to *Jonas Ingham*; he then made a kitchen of the shop and built the house which is now on the lot; I cannot say whose money he built it with. *Jonas Ingham* and his family were down while *Perry* was building." Being cross examined he said, "It seems to me that both *Mr. and Mrs. Ingham* were present when the deed was executed. I do not know that I ever heard *Ingham* say that it was for his daughter, or where the money was to come from. *Perry* lived in the house on the lot, about ten years after it was bought;

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he lived there until it was sold by the sheriff as his property, to *Beach*, and afterwards for some time."

Other testimony was then given by the defendants, which was in substance, that in 1807, *Perry* built the house on the lot now in dispute, that it cost from one thousand five hundred to three thousand dollars. They then exhibited the record of two judgments against *Perry*; the first for about two thousand dollars, and the other for about two thousand five hundred dollars—both of which *Beach* had paid in consequence of a liability so to do, and the judgments were assigned to him. On the first judgment a *fi. fa.* issued, which was levied on this house and lot, which was condemned, and subsequently sold by the sheriff to *Nathan Beach*, the defendant, for one thousand four hundred and eighty-one dollars. Sheriff's deed dated 3d April, 1813.

The plaintiff then gave in evidence the deed of release, before spoken of, of this lot from the mortgage, which was to *Jonas Ingham*; and the receipt for the consideration by the releasor was "received of *J. Ingham*, per *Benj'n. Perry*," &c.

The court (*Scott*, president,) charged the jury as follows:

"The certificate of the clerk of the Circuit Court of the United States produced in evidence on the part of the defendants, was not evidence of the pendency of a suit for the lot in question in that court at the time this suit was instituted.

"The plaintiff on his part has shown a legal title to the land in question; but the defendants resist a recovery, and claim title under *Benjamin Perry*, as whose property the lot was sold, and who, they allege, was the equitable owner. If the jury believe from the evidence that the land in question was a gift to *Perry*, by *Jonas Ingham* the father of *Perry's* wife; that *Perry* was in possession at the time, or went into possession in pursuance of such gift, and made valuable improvements thereon, and continued in possession up to and after the sale to *Beach*, the defendants cannot now be disturbed: their title must prevail. It has long since been settled in Pennsylvania, that a gift of land, accompanied by possession, and by the donees making valuable improvements thereon, was valid. As to notice of *Perry's* equitable title, the law is, that one who purchases a legal estate, without notice of an equitable interest, takes it discharged of the equity. Notice of an equitable title may be actual or legal: actual notice is where notice in fact has been given: legal notice is where from circumstances there is a violent presumption of actual notice. A clear, unequivocal and undisturbed possession by the equitable owner, is notice to all the world of his claim. A judgment against the equitable owner, whilst so in possession, a *fi. fa.*, levy, condemnation and sale thereon, and the sheriff's deed and acknowledgment thereof to the purchaser amounts to legal notice."

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To which opinion the plaintiff's counsel excepted, and the court sealed a bill.

*Conyngham* and *Willetson* for plaintiffs in error.

The evidence contained in the first bill of exceptions was, in substance, parol proof of the existence of a record which was error. *Vanhorn v. Frick*, 3 *Serg. & Rawle*, 282. It was not the best evidence of the fact; the record itself was better.

Second bill. The docket entries of the suit in the Circuit Court were but a part of the record. The record does not purport to be entire, the admission of which in evidence was clearly error. *Vincent v. Huff*, 4 *Serg. & Rawle*, 300. 2 *Sam. Plea. and Ev.* 17. *Whart. Dig.* 223, No. 13, 14. *Edmiston v. Schwartz*, 13 *Serg. & Rawle*, 135. *Christine v. Whitehill*, 16 *Serg. & Rawle*, 106. *Ferguson v. Harwood*, 7 *Cranch*, 410.

When illegal evidence is admitted, the error will not be cured by the direction of the court to the jury to disregard it. *Schaeffer v. Critzer*, 6 *Bin.* 430. *Nash v. Gilkeson*, 5 *Serg. & Rawle*, 352.

Third bill. The declarations of a wife should not be received in evidence to affect the rights of her husband. 1 *Phil. Ev.* 64. 1 *Bac. Ab.* 497, title *Baron & Feme*. *Webster v. McGennis*, 5 *Bin.* 235. But the evidence should not have been received for another reason; that all previous conversations and bargainings on the subject were consummated by and merged in the deed. *Cozens v. Stevenson*, 5 *Serg. & Rawle*, 422. *Heagy v. Umberger*, 10 *Serg. & Rawle*, 342. *Christine v. Whitehill*, 16 *Serg. & Rawle*, 106. *Collam v. Hocker*. 1 *Rawle*, 108. *McWilliams v. Martin*, 12 *Serg. & Rawle*, 269. *Whart. Dig.* 580, No. 10. *Brown v. Dysinger*, 1 *Rawle*, 412.

The court assumed the fact of a parol gift by *Ingham* to his son-in-law, or to his daughter, which there was no evidence to support. He never intended to give the lot to *Perry*, and the charge of the court should have been to this effect. *Meth. Epis. Church v. Jaques*, 1 *Johns. Chan.* 450. *Lancaster v. Doland*, 1 *Rawle*, 231.

The purchaser of a legal title is not effected by an equity of which he has not direct, express and positive notice. *Scott v. Gallagher*, 14 *Serg. & Rawle*, 833.

*Mallory* and *Greenough*, for defendants in error.

The parol evidence mentioned in the first bill of exceptions, was not offered for the purpose of proving the existence of a suit in the Circuit Court, but to show the real transaction with *Kinsey*, and that he had no real interest in the title, which was made to him *mala fide*, as a citizen of another State, in order to give jurisdiction to that court: and this, to meet the allegation of the plaintiff, that he was an innocent purchaser of the legal title without notice of the equity of *Perry*.

The record does not show the object for which the copy of the docket entries was offered; if therefore it was competent for any

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purpose, there is no error in its admission. It was offered and received in the midst of the testimony of the witness, who detailed the facts in relation to the execution and delivery of the deed to *Kinsey*, and while the witness was speaking of the object for which that deed was given; it was therefore competent to show the date of that transaction: for a transcript is sometimes evidence for a particular purpose. *Eisenhart v. Slazemaker*, 14 *Serg. & Rawle*, 153.

But after all the evidence was given, and the aspect in which the cause went to the jury, there is no point of view in which it can be considered, that the plaintiff was at all prejudiced by that evidence: and if so, this court will not reverse the judgment, even if it was illegally admitted. *Allen v. Rostain*, 11 *Serg. & Rawle*, 362. *Brown v. Downing*, 4 *Serg. & Rawle*, 498. *Edgar v. Boies*, 11 *Serg. & Rawle*, 445.

The rule that the declarations of a wife cannot be given in evidence against her husband, is not applicable here: nor were they offered as mere declarations, but as a part of the *res gesta*, the declarations of one engaged in making the contract for the purchase of the lot: if she had been acting even as the agent of her husband, her declarations would be evidence. *Commonwealth v. Eberly*, 3 *Serg. & Rawle*, 9. *Babb v. Clemson*, 12 *Serg. & Rawle*, 328.

The law is well settled that a parol gift by a father to a child, accompanied by possession, and the making of valuable improvements, gives a good title. *Syler v. Eckert*, 1 *Bin.* 378. This position does not seem to be controverted on the other side, but it is called an equity of which the plaintiffs had not notice; this is not so, for *Perry* was always in possession, which is notice to every one. *Billington v. Welsh*, 5 *Bin.* 129. *Harris v. Bell*, 10 *Serg. & Rawle*, 44. *Bechman v. Frost*, 18 *Johns.* 558.

The opinion of the court was delivered by

GIBSON, C. J.—The plaintiffs claim through a conveyance from their father to *Kinsey*, an inhabitant of Jersey, who obtained the legal title for a valuable consideration, as it is alleged, and without notice of the equitable estate of *Perry* and his wife, which, whatever it may be, is vested, at least for her life, in *Beach*, one of the defendants. To rebut this allegation of a purchase without notice, it was open to the plaintiffs to show that the title was conveyed to *Kinsey* on a secret trust to enable the grantor to institute an ejectment in his name, in the Circuit Court of the United States; and with a view to this the defendants might clearly examine the subscribing witness, who was also the attorney of the parties, not only as to what passed at the execution of the deed, but as to what he himself did in consequence of it; and if it should turn out, as it did here, that he immediately instituted an ejectment in the federal court, on failure of which the premises were reconveyed to the

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family of the grantor, it would furnish not only competent but satisfactory proof that the original conveyance was intended merely to give colour of jurisdiction to that court; in which state of the fact, it would be without effect as to the title of a third person.

The docket entries in the Circuit Court which were offered, for any thing that appears, to show that another action for the same land was pending when the present suit was instituted, were undoubtedly inadmissible. It expressly appears by the act of authentication, that the whole record was not certified; and perhaps there is in Pennsylvania, a peculiar fitness in rejecting the arbitrary and often inaccurate memoranda and references from the minutes on the docket to the various parts of the record, as evidence of its contents. Even convenience would not be served by relaxing the rule which requires the whole record to be certified, it being as easy to procure the whole as a part; and were any thing less than the whole to suffice, we can readily see what abuses would ensue from selecting particular parts and suppressing the rest. Here the identity of the premises was the fact on which the effect of the record as evidence in the cause essentially depended; and to prove it, an abstract of the description in the declaration was certainly inferior to the description itself. The judge himself became convinced of the incompetence of the record, and directed the jury to disregard it; but such a direction was held in *Sheaffer v. Kreitzer*, 6 Bin. 431, and *Nash v. Gilkeson*, 5 Serg. & Rawle, 352, insufficient to repair the consequences of the error.

It is not to be doubted that the evidence to establish the trust, was perfectly competent. It is generally true that previous stipulations merge in the conveyance which is the consummation of the agreement; and this holds between the immediate parties in regard to questions of satisfaction of previous covenants, but not between one of the parties and a third person in regard to collateral matters; else a conveyance of the legal estate would, in every case, rebut the implication of a trust. Mrs. *Ingham*, in the absence of her husband, applies to Mr. *Fell* to purchase the lot in dispute for the benefit of her daughter Mrs. *Perry*. The terms are settled and reduced to writing; and, at the time for executing the contract, her ability to treat is recognized by her husband, who takes the conveyance to himself and not to his daughter, only because he deems it prudent to vest the legal estate in himself, the son-in-law being in trade. Had the gift to the daughter been purely gratuitous, it might have been guarded from the claims of her husband's creditors by the creation of a trust; but her equity arises from an expenditure of money by her husband in pursuance of an understanding by all parties, that the lot with the improvements should be a provision for her; without which the gift would be void. I discover no evidence of a gift to *Perry* himself, in the absence of which the ex-

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penditure of his money would give him no estate, in addition to the freehold which the law allows him in her right; which, however, is sufficient, even without the birth of a child, (the wife being alive,) to entitle the defendants to a verdict; and should the jury, whose province it is to judge of the intention from the evidence, be satisfied that the gift was to *Perry*, or to him and his wife jointly, the case would certainly be no worse for the defendants. In the admission of this part of the evidence; therefore, and the direction of the judge as to its legal effect, we perceive no error; but for the comparatively unimportant error in admitting the extract of a record, we regret to say the judgment must be reversed.

Judgment reversed, and a *venire de novo* awarded.

**HUGH BURNS, JAMES ROBINSON and JOHN ROTHROCK,**  
against the HUNTINGDON BANK, for the use of JOHN  
GEISSINGER.

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A judgment was obtained against a principal who gave absolute bail to obtain a stay of execution; after which the absolute bail were sued and judgment obtained against them. *Held*: That one of two sureties in the original obligation who paid one half the debt, is entitled to an assignment of the judgments against the principal and the absolute bail, to enable him to indemnify himself for the amount thus paid.

The order of the court of Common Pleas making such assignment, is the subject of a writ of error.

WRIT of error to the court of Common Pleas of Mifflin county.

*Robert Burns* borrowed from the Huntingdon bank, one thousand dollars, for which sum he gave his note with *John Geissinger*, and *James Mackey*, as endorsers. The note not having been paid at maturity, the bank sued *Robert Burns*, and obtained a judgment against him, and sued *Geissinger* and *Mackey*, the endorsers, and obtained judgment against them. On the 24th January, 1818, *Hugh Burns*, *James Robinson* and *John Rothrock*, became the absolute bail in the judgment against *Robert Burns*, under the 7th section of the act of 21st March, 1806, to obtain for the defendant, a stay of execution for one year from the return day of the writ. The money not having been paid within the year, the bank sued the recognizance of *Hugh Burns*, *James Robinson* and *John Rothrock*, to August term, 1818, and obtained a judgment against them, upon which a *fieri facias* issued, and was levied upon real estate, which was extended.

*Geissinger*, having paid the one half of the judgment which had been obtained against him and *Mackey* as endorsers, on the 21st



(*Hugh Burns, James Robinson and John Rothrock, v. The Huntingdon Bank, for the use of John Geissinger.*)

August, 1824, obtained from the court of Common Pleas, a rule upon *Robert Burns*, the principal, and *Hugh Burns, James Robinson* and *John Rothrock*, the absolute bail, to show cause "why the judgment at the suit of the *Huntingdon Bank v. Robert Burns*, and any recognizance in that suit, should not be marked for the use of the said *John Geissinger*, for the purpose of enabling him to indemnify himself for the money which he had paid in the suit of the same bank against him and *Mackey*."

The right of the court to enforce this rule was denied on two grounds. First. That both parties are bail of *Robert Burns*, and neither has a superior equity. And second. That *Geissinger* is not, at all events, entitled to the interposition of the equitable power of the court, until he has paid the whole of the money.

Both these positions were overruled by the court, (*Burnside*, president,) who made the rule absolute.

This order of the court was here assigned for error.

*Potter*, for defendant in error, moved to quash the writ, on the ground, that there was no final judgment, but a mere exercise of the discretion of the court.

*Blanchard*, for plaintiff in error. The exercise of the power of the court was in the nature of an action, by which one was made liable to another for money; in all such cases a writ of error will lie. *The Commonwealth v. The Judges of the Common Pleas of Philadelphia county*, 3 Bin. 273.

The claim of *Geissinger* to the right to have execution against the absolute bail, is in the nature of a right of action against them, and if it can be sustained, must have the essential qualities of a right of action—privity of contract, and a consideration; neither of these exist here. Both *Geissinger* and *Hugh Burns* and others, the absolute bail, are liable to the bank, each in consequence of his independent legal obligation; as between themselves there is no privity, and neither has a superior equity to the other: in such cases a court of equity will not interfere. *Viers and wife, v. Montgomery*, 4 Cranch, 177.

Equality is not equity between sureties bound by different obligations, *Peck v. Ellis*, 2 Johns. Chan. Rep. 137. *Burrows v. McWhann*, 1 Desaussure's Chan. Rep. 409. 3 Har. & McHen. 254. *Ranch v. Becker*, 12 Serg. & Rawle, 412. *Bachelor v. Fisk*, 17 Mass. Rep. 464.

But at all events there can be no substitution until the whole debt is paid: no one can take the place of the bank until it is first satisfied.

*Potter*, for defendant in error. The bank having obtained a judgment against the principal in the note, who procured absolute bail to be entered for a stay of execution, the recognizance then entered into became a part of the judgment, and an additional

(Hugh Burns, James Robinson and John Rothrock v. The Huntingdon Bank, for the use of John Geissinger.)

security to the bank : and upon the well settled principles of equity in Pennsylvania, a security who pays money for the principal is entitled to all the securities which the plaintiff has for the debt. *Wolfsberger v. Bucher*, 10 *Serg. & Rawle*, 12. The same doctrine is contained in *Parsons v. Briddock*, 2 *Vernon*, 608. If the Huntingdon bank had had the bond of a third person as a collateral security, the endorsors would have been entitled to an assignment of it also. *Hays v. Ward*, 4 *Johns. Chan.* 127. The doctrine of substitution does not depend upon privity of contract, but upon principles of equity and justice. *Dorsheimer v. Bucher*, 7 *Serg. & Rawle*, 9. *Lenox v. McCull*, 9 *Serg. & Rawle*, 309. *Classen v. Morris*, 10 *Johns. Rep.* 524. *Waddington v. Redinburg*, 2 *Johns. Cases*, 227. *King v. Baldwin*, 2 *Johns. Chan.* 554. 1 *Eq. Ca. Ab.* 93. 1 *Atkins*, 135. 2 *Peer Wms.* 543. *Hawk v. Geddis*, 16 *Serg. & Rawle*, 23.

The endorsors were prejudiced by the interference of the absolute bail who put a stop to the proceeding of the bank to obtain the money.

*Hale*, in reply. We are concerned as well for the bank, as for the absolute bail; and contend that in no case can the sureties claim an assignment of the judgment or other security against the principal until they have paid the whole debt. Here *Geissinger* has paid but one half of the debt, and under these circumstances no court has power to interfere with the securities of the bank until their debt is paid in full.

If this order of the Common Pleas is sustained *Geissinger* may take out a *lib. fas.* for the one half of the judgment and at some future day *Mackey* may pay the other half and take out a *lib. fas.* for his money: or before such payment the bank may take out a *lib. fas.* for the balance yet due to them, which would be exceedingly inconvenient and irregular, and which shows the propriety of the rule, that the whole debt must be paid.

The entry of absolute bail for the stay of execution was a legal consequence, and which the endorsors therefore knew, when they undertook the responsibility of endorsing for *Robert Burns*. They were not prejudiced by this: and if they were, it was the subject of proof, and which it was incumbent upon them to make.

But there is another ground of objection. Although the condition of the recognizance, entered into by the absolute bail was, that the defendant in the judgment should pay the money within a year, yet time was not of the essence of that contract, for a discharge of the original judgment at any time thereafter, would be a discharge *pro tanto* of the recognizance, whether that payment be made by the defendant himself or by any collateral security which the plaintiffs had for their money. The payment, therefore, by *Geissinger* of five hundred dollars, discharged the judgment against the princi-

(*Hugh Burns, James Robinson and John Rothrock, v. The Huntingdon Bank, for the use of John Geissinger.*)

pal to that amount; and of course discharged the recognizance of the absolute bail to the same amount.

The opinion of the court was delivered by

GIBSON, C. J.—It seems the bank is satisfied, and the question is between *Geissinger*, who actually paid the debt of *Burns*, and *Rothrock* and *Robinson*, who were bound by recognizance and judgment to pay it. As against *Burns*, in relation to whom *Geissinger* stood as a surety, the case would be clear; but it is said that as against *Rothrock* and *Robinson*, who also stand in the relation of sureties, and not in privity with *Geissinger*, there is not the same equity. Privity is perhaps essential to a claim for contribution, but it is certainly not indispensable to the right of subrogation; of which *Parsons v. Briddock*, 2 Vern. 608, is an emphatic instance. There, a judgment against bail in an action on the several bond of the principal, was decreed to be assigned to the sureties who had, in the meantime, been compelled by an action on the same bond, to pay the debt. Yet there was no privity; and although both parties stood in the relation of surety towards the principal, they nevertheless stood in unequal equity between themselves, because the bail had so identified himself with the principal as not to be distinguished from him. Nor ought they to be distinguished here, inasmuch as they interposed to procure a personal advantage to the principal, and to the detriment of the surety, who might perhaps, have been exonerated, had the proceedings not been staid against the principal; and in this respect the case is rather stronger than *Parsons v. Briddock*. The bank being satisfied, there is therefore no doubt that *Geissinger* is to be substituted for the amount paid by him. On the other hand, there is as little doubt that a writ of error lies on an order like the present, which is in the nature of an award of execution, and which would otherwise leave a party injured by it, without remedy.

Order of the Common Pleas affirmed.

DANIEL DEVINNEY *against* MARY ANN REEDER.

The Court of Common Pleas may grant a new trial upon the terms, that the defendant shall pay all the costs which have accrued up to the time of trial; and may enforce that rule, by entering judgment upon the verdict against the party refusing to comply with it.

But if the plaintiff acquiesces in the non-payment of the costs, by proceeding to take testimony on a commission to another State, or proceeds to enforce the payment of them by citation and attachment, he cannot afterwards have judgment by default of the payment of such costs.

ERROR to Huntingdon county.

This was an action of ejectment brought by *Mary Ann Reeder* against *Daniel Devinney*.

At January term, 1818, the cause was tried and a verdict given for the plaintiff. At the same time the court granted a new trial, "on payment of costs by the defendant." At November term, 1818, the plaintiff took a commission to Ohio, to take the testimony of witnesses on interrogatories filed and served on the defendant. On motion of plaintiff's counsel, at April term, 1819, a rule was granted on *Daniel Devinney* to pay the costs of suit up to the time of trial. On motion of plaintiff's counsel, at April term, 1820, a rule was granted on *Daniel Devinney*, to show cause why an attachment should not issue against him for not paying the bill of costs. It did not appear by the record whether these rules were served or not. On the 26th February, 1822, on motion of the plaintiff's attorney, the court granted a rule on the defendant, "that judgment be entered for the plaintiff upon the verdict on the 1st day of June next, unless the costs be paid agreeably to the terms on which the new trial was granted." On the 3d June, 1822, the costs not having been paid, the prothonotary, without motion, but by direction of the plaintiff's attorney, entered judgment for the plaintiff according to the rule.

This writ of error was sued out to reverse that judgment.

*Fisher*, for plaintiff in error—Contended, that the proceeding by the defendant in error, after the new trial was awarded, was an election from two remedies by which she was bound. The payment of costs by the defendant, was waived by the plaintiff proceeding to prepare for another trial, and thus putting the defendant to the trouble and expense of taking depositions on her commission to the State of Ohio. *Clark v. M'Anulty*, 3 Serg. & Rawle, 364. *Zeigler v. Fowler*, id. 288.

*Hale*, for defendant in error.—The payment of the costs was a condition precedent to the award of a new trial; and could only be enforced by a rule on the defendant to pay them, or yield the right to have a new trial. The defendant had not agreed to accept the terms offered by the court, and could not therefore be compelled to pay the costs upon attachment, those rules, therefore upon him,

(Daniel Devinney v. Mary Ann Reeder.)

were irregular; the only one which could legally be enforced was the last one, upon which the court acted.

The judgment entered by the prothonotary was regular. 1 *Tidd's Prac.* 506.

The opinion of the court was delivered by

ROGERS, J.—After verdict for the plaintiff, the court, on motion, granted a new trial on payment of costs by the defendant. Awarding a new trial on terms, is the every day practice in England, and there can be no doubt it is a power inherent in the courts of this State.

Had the defendants refused to pay the costs, on a rule granted for that purpose, the court might have rendered judgment on the verdict; which would be in the nature of a penalty, for a non-compliance with the order of the court. Instead of applying to the court in the first instance, or taking any other means to enforce compliance with the order, the plaintiff by entering a rule for a commission, treated the cause in the same manner as if a new trial had been granted without condition. Although this proceeding may not prevent him from compelling the payment of the costs by attachment; yet by this step, he waives the right of making the payment of costs a condition precedent to a new trial. At the April term, 1819, the court, *on motion*, entered a rule on *Daniel Devinney* to pay the costs of the suit, up to the time of the new trial. At the April term, 1820, the court also, *on motion*, granted a rule, to show cause, why an attachment should not issue against the defendant, for not paying the bill of costs.

Why these rules were not enforced, we have not been informed. We have no evidence that they were abandoned by leave of the court; but the contrary appears. On the 26th February, 1822, we have the following rule: "Rule, that judgment be entered for plaintiff, by the first day of June next, unless the costs be paid, agreeably to the terms on which the new trial was granted." And on the 3d of June, we have this entry: "The defendant having neglected to pay the costs, therefore judgment for plaintiff agreeably to rule." It is impossible to inspect the record, without perceiving that the rule on which judgment was given, was entered in vacation without leave of the court, and also that judgment was signed in vacation, without any proof whatever of the service of the rule on the defendant. This is a practice we cannot sanction. The rule for the payment of costs, on judgment, is an act of the court, which cannot be entered in vacation; but must be granted by the court, on motion in open court: in them, not in the party, is vested the power of fixing the time for the payment of costs, on the penalty of judgment in case default be made. It is also a first principle in the administration of justice, that the party on whom the rule is granted, shall have reasonable notice.

Judgment reversed, and a *venire de novo* awarded.

GIBSON, C. J., unwell, and not present at the argument.

The COMMONWEALTH for the use of THOMAS BEALE'S  
Administrators, against THOMAS HENDERSON.

An administration account stated and filed in the Register's office, is not a compliance with a recognizance, conditioned for the settlement of an account; and upon a suit brought upon that recognizance, by one of the heirs of the estate, which the administrator represented, he is entitled to recover nominal damages, although the jury may believe that his interest in the estate had been paid to him.

It is error to submit a motion of law to the jury.

WRIT of error to Mifflin county.

In the court below this was an action of debt brought upon a recognizance; and the following were all the facts of the case.

*Thomas Gilson*, in 1817, died intestate, leaving real and personal estate, and several children, one of whom was married to *Thomas Beale*, the plaintiff's intestate. In the year 1818, *Thomas Beale*, obtained from the Orphans' Court of Mifflin county, a citation to *David* and *William Gilson*, who were the administrators of *Thomas Gilson*, to appear and settle an account of their administration: at subsequent terms an attachment and *alias* attachment were awarded against them, upon the latter the sheriff on the 7th March, 1819, brought the said *David* and *William Gilson* into court. *Thomas Henderson* the defendant, then entered into the recognizance, upon which this suit is brought, in the sum of three thousand dollars; on condition "that the said *David Gilson* and *William Gilson* should appear at the Orphans' Court, to be held the third Monday of April next, and settle an account of their administration of the estate of *Thomas Gilson*, deceased." This was the plaintiff's case, upon showing which, he rested.

The defendant then exhibited an account of the administration of the estate of *Thomas Gilson*, deceased, by his administrators, *David* and *William Gilson*, which had been filed by them, in the Register's office of Mifflin county, on the 10th March, 1819; but which had never been approved or confirmed by the Orphans' Court.

Upon this evidence, the court charged the jury as follows: "We are of opinion that in point of strict law the plaintiff is entitled to recover; but if the jury believe that *Thomas Beale* was satisfied, we leave it to them to say whether the plaintiff is entitled to one farthing; and if they think proper, they may find a general verdict for the defendant."

Exception was taken by the plaintiff to this charge, and it was assigned as error in this court.

*Fisher*, for plaintiff in error.

*Hale*, for defendant in error.

PER CURIAM.—The judgment of the court of Common Pleas is reversed, because the court left the determination of the law to

(The Commonwealth for the use of Thomas Beale's administrators, v. Thomas Henderson.)

the jury. It is apparent that the plaintiff is entitled to, at least, nominal damages; notwithstanding which the court left it to the jury to say whether the plaintiff was entitled to one farthing; and instructed them that if they believed *Beale* was satisfied, they might find a general verdict for the defendant. In this there was manifest error.

Judgment reversed, and a *venire de novo* awarded.

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**JOHN HALL, Jr. and others against JOSIAH M. BENNER.**

A purchaser at sheriff's sale before the deed is acknowledged, has not such a title to the land struck down to him, as will authorize him to give a lease of the premises; and if he does give such a lease to the defendant as whose property it was sold, it will not create the relation of landlord and tenant between them, so as to estop the lessee from disputing the title of the lessor.

The general rule of law, that a tenant shall not dispute the title of his landlord, is restricted to cases in which the lease has been fairly obtained, without any misrepresentation, management or fraud.

The date of a deed is *prima facie* evidence of the time of its delivery, but it is not conclusive.

The recital in a sheriff's deed, that the sale was made on a certain day, does not estop the grantee from showing by parol, that it was made on a prior day.

Whether a water-right and tilt-hammer are appurtenances to land, and will pass by a sheriff's sale, made by virtue of a judgment upon a mortgage of the land, depends upon the facts of the case, and must be submitted, as a matter of fact, to the jury.

If the court should decide from inspection of the papers, that such a right would pass as an appurtenant, it would be error.

Warr of error to the court of Common Pleas of Centre county.

This was an action of ejectment brought by *Josiah M. Benner*, against *John Hall, Jr.* to recover three lots of ground, a house, black smith shop, tilt-hammer and water-right in the borough of Bellefonte.

The defendants took defence for the black smith shop, tilt-hammer and water-right.

*John Hall, Sr.* under whose title both parties claimed, was the owner of three lots of ground, which he held by deeds from *James Harris* and wife: the lots adjoined each other and were each described in the deeds from *Harris* to *Hall, Sr.* thus "containing sixty feet in front on Spring street, extending thence westward to the water edge of Spring creek."

*James Smith*, who was the owner of land on Spring creek, above and near to these three lots, by deed, dated 28th, April, 1806, conveyed to *John Hall, Sr.* "the right to erect a dam in said creek,

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upon the land of the said *Smith*, and to use the water of Spring creek, for the purpose of working a tilt-hammer and blade mill; and the said *Hall* to erect no other mill."

On the 4th of January, 1819, *John Hall*, Sr. and wife conveyed the said lots to *John Hall*, Jr. and described the property in the deed, thus "three certain lots of ground situate in the borough of Bellefonte, being Nos. 130, 131, 132, in the plan of said town, on the west side, and fronting on Spring street, adjoining each other, and extending westward to the water edge of Spring creek, (they being the same lots which *James Harris* and wife conveyed to *John Hall*, Sr.) together with all and singular the houses, out houses, and buildings, ways, woods, waters, water courses, rights, liberties, privileges, hereditaments and appurtenances, whatsoever thereunto belonging, or in any wise appertaining, and the reversions and remainders, rents, issues and profits thereof. Also, all the estate, right, title and interest, use, claim and demand whatsoever of the said *John Hall*, and his wife, in law, equity or otherwise howsoever, of in to or out of the same; to have and to hold the said three lots of ground, hereditaments and premises hereby bargained and sold, with the appurtenances, to the said *John Hall*, the younger, his heirs and assigns forever, warranting the within described three lots of ground, hereditaments and premises hereby bargained and sold, with the appurtenances, to *John Hall*, Jr. against all persons whatsoever."

On the 29th October, 1821, *John Hall*, Jr. executed a mortgage to *Roland Curtin*, upon these premises, in which they are described as "the three lots, Nos. 130, 131, 132, which *John Hall*, Sr. conveyed to *John Hall*, Jr. together with the buildings, rights, ways, water courses, and appurtenances whatsoever thereunto belonging, and in any wise appertaining."

There was an amicable judgment confessed by the defendant *John Hall*, Jr. upon a *scire facias*, on this mortgage, which was entered No. 3, November term, 1824. A *levari facias* issued on this judgment to November term, 1824, No. 4, upon which the property was sold to *Josiah M. Benner*, the plaintiff, for one thousand and five dollars.

To the admission of these proceedings in evidence the defendants objected: that they are not regular; the *scire facias* is not signed or sealed by the officer; not tested of any term; and the judgment purports to be entered before the test day of the writ.

These objections were overruled and exception was taken by the defendant.

After the sale to *Benner*, the sheriff who made it went out of office before a deed was executed; and by an order of the court, his successor executed a deed to the plaintiff, on the 26th April, 1825, which was acknowledged in open court the same day.



(John Hall, Jr. and others, v. Josiah M. Benner.)

The plaintiff then offered in evidence a lease for the premises in dispute from him to the defendant, dated 26th November, 1824.

The defendant objected to this evidence on the ground that *Josiah M. Benner* had no right to give a lease, not having received a deed from the sheriff, that the deed afterwards received by him recites the sale to have been made after the lease purports to have been executed, and that the writ of *levari facias* was not returned.

These objections were overruled by the court, the testimony admitted, and exception taken by defendant.

The plaintiff then gave evidence that the property was struck down before the date of the lease.

The defendants gave some parol evidence of the circumstances which occurred between the parties at the time the lease was executed, from which they contended that undue means were made use of by *Benner*, in obtaining the consent of *Hall* to execute it.

The defendants then offered to prove "that a considerable part of the shop is built outside of the three town lots, and on the right conveyed by *Smith* to *Hall* the elder, by deed, dated the 26th April, 1806; that on the 26th January, 1825, and after the mortgage was given, *Hall* the elder, conveyed this same right to *Hall* the younger, the defendant in this suit."

This evidence was objected to by the plaintiff. First. Because the defendant is a tenant, and cannot dispute the title of his landlord. And second. Because the written papers vest the title in the purchaser at sheriff's sale.

On both grounds the testimony was overruled by the court, who instructed the jury "that the plaintiff had shown a right to recover on every ground."

1st. As landlord, it is a sacred principle of the law, that the tenant shall not dispute the title of his landlord.

2d. That the fair and correct construction of the defendant's conveyance, mortgage, judgment, sale and sheriff's deed, vested the right to the whole property, whatever it was, in the plaintiff, and that the conveyance by *Smith* was an appurtenance, which attached to, and passed with the other property.

A verdict and judgment having been rendered for the plaintiff, the defendant sued out this writ of error.

*Blanchard* and *Hale*, for plaintiffs in error.

*Benner* having had no title whatever to the premises in dispute at the date of the lease, he could not create a tenancy, and that he had no right, is established by the case of *Hawk v. Stouch*, 5 Serg. & Rawle, 157.

If the lease was evidence at all, it was only admissible to show what *Hall* considered was sold to the plaintiff, and not as conclusive evidence of what the plaintiff's right was.

Whether the acceptance of the lease by *Hall* was a surrender of his title, was a matter of fact, which should have been submit-

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ted to the jury, under all the evidence which was given, and which was offered to be given by the defendants. *Hamilton v. Marsden*, 6 Bin. 45. *Galloway v. Ogle*, 2 Bin. 468. *Jackson, ex dem. v. Vosburg*, 7 Johns. Rep. 186. *Miller v. M. Bride*, 14 Serg. & Rawle, 382. *Brown v. Dysinger*, 1 Rawle, 408.

There can be no intendment or presumption of what was conveyed to *John Hall, Jr.* previously to the execution of the mortgage, for the deeds are plain, and manifestly convey the three lots of ground and nothing else. The property now in dispute is not an appurtenant to the lots, but is of itself a freehold, which came to *John Hall, Jr.* by deeds separate and independent of those which conveyed to him the lots, and obtained at a different time: and that, after the execution of the mortgage, upon which the plaintiff's title is predicated: it is a property in addition to the lots and not at all embraced within the description as contained in the mortgage or any of the previous conveyances. Land cannot be appurtenant to land, 1 *Plowden*, 170. 3 *Saunders*, 401, cited *Bettesworth's case*, 2 Rep. 32. *Blackburn v. Edgley*, 1 Peer Wms. 603. *Smithson v. Cage*, *Croke Jas.* 526.

● *Potter*, for defendant in error.

The terms of the several deeds which conveyed the title to the mortgaged premises are sufficiently comprehensive to carry the appurtenance which is now in dispute. *Pickering v. Stapler*, 5 Serg. & Rawle, 107. *Blaine v. Chambers*, 1 Serg. & Rawle, 169. *Dunbar v. Jumper*, 2 *Yeates*, 74. *Gray v. Holdship*, 17 Serg. & Rawle, 413.

The possession of the water right or appurtenant always accompanied the deeds; and it is apparent from all the papers that it was the intention of the father and the son that the tilt-hammer and the water-right was to pass by the deed. They never thought of conveying them separately until after this cause of action arose.

The lease to *Hall, Jr.* by *Benner* was voluntarily accepted, and cannot now be impeached. *Graham v. Moore*, 4 Serg. & Rawle, 467.

The opinion of the court was delivered by

Ross, J.—This was an ejectment for three lots of ground, house, blacksmith shop, and tilt-hammer in the borough of Bellefonte.

The defendants took defence for the blacksmith shop, tilt-hammer and water-right.

The first bill of exception was to the admission of the amicable *scire facias*, and the confession of judgment thereon, the 29th of October, 1824, for seven hundred and forty-two dollars and sixty-eight cents.

The objection to the *scire facias* was, that it was not regular; not signed and sealed by the officer, and not tested at any term:—to the judgment, because it purports to be a judgment before the test day of the *scire facias* on the mortgage.

The law is well settled, that a man may waive any right to a

(John Hall, Jr. and others, v. Josiah M. Benner.)

particular mode of judicial proceeding against himself. The plaintiffs in error could not have been proceeded against adversely on the mortgage in any other way than by ejectment, or by a *scire facias* under the act of assembly. But when the mortgagor is alone to be affected, he may agree to dispense with both these modes of proceeding, which have been provided, as well for his protection, as a remedy for the mortgagee. This is often done by the consent of the parties to save costs; sometimes to expedite the sale, and the collection of the money; sometimes to render a purchaser more secure in his title, at an earlier day than it could be otherwise done in pursuance of a previous agreement. The plaintiffs in error, on the 29th of October, 1824, entered an amicable *scire facias*, and judgment thereon, by agreement, with the mortgagee, for seven hundred and forty-two dollars and sixty-eight cents.

A *levari facias*, issued to the November term following. It might, very properly, be tested of the preceding term. It is done so in other cases, where execution issues on a judgment entered in vacation, to the next succeeding term.

To this course, all the parties in interest assented. There was nothing done in contravention of any rule of law or practice; no body had any right to complain of it, because no one was injured; it was sanctioned by the plaintiffs in error, and acquiesced in by them until the trial of this cause. No motion was made to set aside the proceedings on the amicable *scire facias*, or the sheriff's sale under them; no writ of error brought to reverse them; they therefore, by their acts and their neglects, expressly or tacitly, waived all objections, if any existed. A judgment erroneous is good until reversed. 2 *Serg. & Rawle*, 142. 4 *Serg. & Rawle*, 467.

The record was evidence against them. 1 *Salk*. 276, 290. *Holt*, 292. 11 *Serg. & Rawle*, 168.

Whether the sheriff's deed poll duly acknowledged and certified under the seal of the proper court, as directed by the act of the 6th of April, 1802, would have been full and conclusive evidence against the person named in the execution, under which the premises were sold, is not a question now made. There was no error in the admission of the amicable *scire facias* and the proceedings on it.

The second bill of exception was to the admission of a lease, proved by the subscribing witnesses, from *J. M. Benner* and *P. Benner, Jr.* to *John Hall, Jr.* for three lots bearing date, November 26, 1824.

The defendant's counsel objected to it, "because *Philip Benner, Jr.* and *J. M. Benner* had no right to make a lease. They had not then got their deed. The sheriff's deed recites the sale as made the day after the lease purports to have been executed. The writ was not returned."

It is true a man cannot grant that which he hath not, or more

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than he hath; although he may covenant to purchase an estate, and levy a fine to uses, which will be good. *Bac. Max.* 58. *Peck, Sec.* 65.

A lease doth properly signify a demise or letting of land, &c. unto another for a lesser time, than he that doth let it, hath in it. *Shep. T.* 286. *Plow.* 421, 432.

Assuming the above authorities to be law, it would seem to be very clear, that a man cannot make a valid lease to another who is in possession of land, when such lessor has no interest, title, possession or right of possession in the premises he lets.

The tenant, under a lease made by such a lessor, should never be estopped from disputing his landlord's title. To a tenant so circumstanced, the doctrine of estoppel is totally inapplicable, yet the lease was evidence. The acts and declarations of a party in interest, and to the suit, are evidence against him. *Whart. Dig.* 365, pl. 405. 1 *Dall.* 65. 10 *Serg. & Rawle*, 268. *Marshall v. Sheridan*.

The evidence was therefore properly admitted, both as the deed and as the declaration of the defendants below, having a direct relation to the matters in dispute.

The third exception was to the admission of the evidence of *William Ward* and *James M. Petrikin*, to prove that the property had been struck down before the lease was executed, and that the date of the lease is a mistake.

*Prima facie* every deed is supposed to be made the day it bears date. 3 *Liv.* 348. 1 *Sel. Pr. R.* 422.

But it takes effect from, and therefore has relation to the time, not of the date, but of its delivery; and this is always presumed to be the time of its date, unless the contrary do appear. The time of delivery is material; and is always to be tried by a jury. *Shep. T.* 72.

It would be easy to cite authorities on this point, and to illustrate the position laid down by a great variety of cases; but it would be a useless labour, as no doubt can be entertained of its correctness. It is however contended, that admitting the law to be as above stated, the defendant in error was estopped by the recital in the sheriff's deed, that the sale was made on the 27th November, 1824, from showing it was made on any other day. A general recital is no estoppel, yet a recital of a particular fact is so. 1 *Show.* 59. 2 *Leon.* 11. 3 *Leon.* 118. And the recital, to be an estoppel, must be material. 2 *Leon.* 11. 3 *Leon.* 118. The recital of the day when the property was sold is not material, and therefore the defendant in error was not estopped from showing the truth. A man is estopped to say any thing against his own deed. *Co. Lit.* 363 b. 2 *Black. Com.* 295. *Co. Lit.* 252 a. But this was not the deed of the defendant in error. It was the deed of the sheriff to him; it was the deed of a ministerial officer authorised to make the sale, whose mistakes in the execution of his duties should never

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be permitted to prejudice the rights of the grantee by way of estoppel. There was no error in admitting this evidence.

The fourth exception was to the rejection of the following evidence offered by the plaintiffs in error. "That considerable part of the shop is built outside of the town lots, and on the right conveyed by *Smith* to *Hall*, the elder, that on the 26th January, 1825, *John Hall*, the elder, conveyed to *John Hall*, Jr. all his right under *Smith's* deed."

"This evidence was objected to, and overruled by the court. First. Because the defendant is a tenant and cannot dispute the right of his landlord. And second. Because the written papers vest the title of the property in the purchaser at sheriff's sale."

If the opinion already given on the previous exceptions is correct, it is clear that the plaintiffs should have been allowed to prove what they offered; they had proved by *William Pettit*, "that he was present with *Benner* and *Hall*, heard *Benner* pressing *Hall* to take a lease; *Hall* down spirited; *Benner* said he was going away next day, and wanted it fixed. This was after the property had been sold. *Benner* said he might have it till spring on easy terms; did not want to turn him out; wanted him to take it; *Benner* said, if he did not take a lease, he would be under the necessity of removing him and obtaining possession by the sheriff; *Hall* said he wanted to see Mr. *Potter*; it was on the day before *Benner* was to start away; it was in the afternoon of the day."

This evidence of *Pettit*, corroborated as it was, by *Petrik* and *Ward*, was sufficient, connected with the circumstances, under which the lease was obtained, to induce a belief that the lease was procured by management: by a *suggestio falsi* in alleging he had purchased the whole at sheriff's sale: that he had a right to dispossess them of the whole, and his hurrying them into the execution of the lease, without an opportunity of consulting their counsel or friends, as they expressed a desire to do, a measure suggested to *Benner* by Mr. *Petrik*, as a safe one if he intended to hold the property.

The plaintiffs in error were not such tenants as precluded them from showing what they offered to prove. The very question trying was, whether the written papers vested the title of the property in the purchaser at sheriff's sale? If they did—what property? Was the tilt-hammer and water right conveyed by *Smith* to *Hall*, Sr. included in the sale made by the sheriff? Was any thing more sold than three lots? If not—did the three lots extend westerly beyond the water's edge of Spring creek? If they did, how far—did they include the shop, tilt-hammer and dam? A solution of these questions could only be made by an application of the description of the property contained in the deed, to the property claimed under it. The situation of the property claimed, and the relation it bore to the property described, could only be

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ascertained by parol proof. The court, therefore, erred in rejecting the evidence.

The court instructed the jury, that the plaintiff below had shown a right to recover on every ground: First, as landlord—It is a sacred principle of law, that the tenant shall not dispute the title of his landlord. Second. That the fair and correct construction of the defendant's conveyances, mortgages, judgment, sale, and sheriff's deed, vested the right of the whole property, whatever it was, in the plaintiff; and that the conveyance by *Smith* was an appurtenance which attached to the property.

To this charge the plaintiffs in error excepted, and this forms the fifth bill of exceptions.

It may be true, as a general principle of law, that the tenant shall not dispute the title of his landlord. Yet the application of this general principle is restricted to cases in which the lease has been fairly obtained, without any misrepresentation, management or fraud.

A lease unfairly obtained, will not prevent the lessee from contesting the title of the lessor. *Brown v. Dysinger*, 1 *Rawle* 408, 415, and the authorities there cited. In that case, the only evidence of unfairness was, that *Walker* threatened to turn *Brown* out of possession, if he did not execute a lease; and that *Brown* was then very sick with the consumption, and died sometime the following month. The case under consideration is much stronger in favour of the tenant than that of *Brown*.

The correctness of this observation will be manifest by a reference to the testimony recited, in giving the opinion in this cause, on the third and fourth bills of exceptions. *Benner* urged the execution of the lease on the ground that he had a right to the possession of the whole of the premises, and that he had the right to remove *Hall* by the sheriff, and refused *Hall* time to consult his counsel.

This was a suggestion of a falsehood calculated to mislead *Hall*. *Benner* had at the time no title to the land. The *levari facias* was not then returned. If the property had been then struck off to him, there was no record of it. And if there had been, the sale was liable to be set aside at the instance of *Hall*, or his creditors; or to be defeated by his (*Benner's*) neglect to comply with the conditions of sale.

Until the sheriff's deed to him was acknowledged, he could legally take no step to obtain possession; and even then, of nothing not contained in the deed. When acknowledged, he must have given three month's notice before he could have a jury called to dispossess *Hall*, which would have prevented him from removing him by the sheriff forthwith, as it was evidently insinuated he had a power to do. The proposition, which was made on the 26th of

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November, 1824, was to lease it to him until spring, on easy terms; when it appears that the sheriff's deed to *Benner* was not acknowledged until the 26th April, 1825.

If this case does not exhibit all those features of management, unfair and uncandid conduct, as well as misrepresentation on the part of *Benner*, I should be at a loss to conceive one what would. It is evident that *Hall* was taken by surprise, and was artfully inveigled and hurried into the execution of the lease, without any opportunity of consulting his friends or his counsel, which he desired to do.

There is a wide difference between the case of a lease from a person having title or possession; and that of a lease from one having no title, no possession or no right to possession, as to the conclusiveness of the evidence. In the former case, generally speaking, the tenant would be estopped from disputing his landlord's title, unless fraud, mistake or imposition, be clearly proved. In the latter case, the lessee would not be concluded by the lease, because the obtaining a lease under such circumstances, would generally be considered as unfairly procured. The plaintiffs in error, on the facts disclosed by the defendant in error, should have been allowed to have impeached the lease: and the testimony of *Pettit* and the other witnesses should have been submitted, to the jury.

The court unquestionably erred in the instructions given to the jury on the second point. The fair and correct construction of the defendant's conveyances, mortgages, judgment, sale and sheriff's deed, arising on the face of the papers, without reference to any extrinsic circumstance, is that nothing more was sold under the mortgage than what was contained in the description of the property mortgaged, and that nothing more vested in the purchaser.

The mortgage was for three lots, which *John Hall*, the elder, had conveyed to *John Hall*, Jr. Those lots were described by Nos. 130, 131 and 132, in the town plot of Bellefonte, with clearly designated boundaries: each containing sixty feet in front on Spring street, and extending thence westwardly to the water's edge of Spring creek. On the face of the title papers, these three lots, only, were conveyed to *Benner*. The sale was effected by a proceeding on the mortgage. The Sheriff could sell no property which was not described in the mortgage, and conveyed by it, unless from its very nature and quality, it was necessary to the enjoyment of what was actually described.

If a mill had been within the boundaries of the lots sold, and it had been granted, the water as used for the mill would have passed as appurtenant to it. 3 *Salk*. 40.

But if a man sells a mill *cum pertinentiis*, and the jury find a kiln was occupied with the mill for many years, the kiln shall not pass

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by those words, for it might be a lime kiln; and might have no relation to the mill: but if the jury had found it to be a malt kiln, it might be otherwise. *Shep. T. 89-90.*

Strictly speaking lands cannot be appurtenant to lands, or a message to a message. *Plow. 170. 1 Sil. Ab. 91.*

But the word *pertens* may be taken in the sense of *usually letten or occupied* with the land. *Plow. 170.* Lands shall pass on a lease or devise of a house as pertaining to the same, when it hath been used and occupied with it, ten years or more: which is adjudged a sufficient time to make it appertaining to the house. *Cro. Eliz. 704.* A grant of a manor *cum pertinentiis*, it is said, will pass all things belonging to the manor. *Owen's R. 31.*

But in all these cases, it must be ascertained by parol proof, what was usually letten or occupied with the land, the message, mill or manor, unless the extent of the claim appears on the face of the paper title: and even then to settle what lands, what waters, what dams or races have been used and occupied as appertaining to the property purchased.

All these are questions involving matters of fact, not appearing on the face of the title papers, and should have been submitted to the jury for their decision. The court excluded very important evidence as to the relative situation of the two properties: refused to let the plaintiffs in error prove that the shop was partly situated on the tract bought of *Smith*, and not included in the mortgage, which went to shut out all the evidence of plaintiffs in error, as to their title, their possession and occupancy: the situation of the dam, the race, and the land purchased of *Smith*; and then instructed the jury that all the rights vested by the paper title in the defendants in error; and by it they were entitled to recover.

Who can say, on looking over the paper title, which was the most worthy: the property derived from *Smith*, or that derived from *Harris*. That which is the most worthy is the principal: and when ascertained by a grant of it, that which is less worthy or incident, or accessory, shall pass by the grant. The principal will not pass by the grant of the incident or accessory. *Accessorium non ducit, sed sequitur suum principale. Shep. T. 89.*

For any thing that appears to the contrary, the right derived from *Smith* may be the principal. The deed from him to *Hall* senior, bears date the 26th of April. 1806. The deed from *Harris* to *Hall* bears date the 27th of November, 1807. The title to the property purchased of *Smith* is above a year and six months older than that of *Harris* to *Hall*. The title to the property acquired by the purchase from *Smith* existed in *Hall* independent of the three lots granted by *Harris* to him, more than eighteen months prior to the title acquired from *Harris*. It was not, therefore, during that time appurtenant to the three lots purchased of *Harris*. If it ever became appurtenant thereto, when and how? This can only be



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shown by matter in *pais*. It was not purchased as a necessary appendant to the enjoyment of the three town lots, because it was purchased long before *Hall* became the owner of the three town lots. From all that appears, the property purchased of *Smith* was the principal, and the purchase from *Harris* was the accessory; and requisite to the full enjoyment of the rights purchased of *Smith*. These matters may be made to wear a very different complexion from that which they exhibit now on the face of the papers.

Judgment reversed, and a *venire de novo* awarded.

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CHARLES COX *against* JOHN NORTON, who survived  
GEORGE HANAWALT.

In a suit brought by the administrators of a deceased's estate, to recover the purchase money of land, sold by them in pursuance of an order of the Orphans' Court, one of the heirs of that estate, who had at the bar, upon the trial of the cause, released all his interest in the estate to another of the heirs, is a competent witness for the plaintiffs.

A witness, who swore before arbitrators, that from an entry in his book, which he had then before him, he knew an occurrence had taken place on a certain day, having died before the trial of the cause in court; it is competent to prove what he swore before the arbitrators without the production of the book.

The fact of a paper having been given in evidence before arbitrators, without objection, is no reason why it should be received upon the trial of the cause in court, if it is otherwise illegal.

Warr of error to the Special Court of Mifflin county, (*Reed*, president.)

This was an action of debt upon a bond brought by *John Norton*, who survived *George Hanawalt* against *Charles Cox*. The plaintiff *Norton* and *Hanawalt* were the administrators of *Philip Powell*, deceased, and as such, by an order of the Orphans' Court, sold the real estate of the deceased to *Charles Cox*, the defendant below, and took his bonds for the purchase money, upon one of which this suit was brought.

The only thing to be tried in the cause was the genuineness of a receipt dated 22d October, 1824, alleged to have been given by *George Hanawalt* in his life time, to the defendant, for one thousand one hundred dollars. Many bills of exception were taken to the admission and rejection of evidence, during the course of the trial, only three of which are material to be stated.

The cause had been tried before arbitrators, when the subscribing witness to the receipt testified that the receipt was signed by *George Hanawalt* on the day it bears date, and at a certain place.

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A witness was then called to prove that on the day the receipt bears date, *George Hanawalt* was at another place. The witness brought his day book before the arbitrators, and having it open before him, he said that from an entry in it, he knew that *George Hanawalt* was in Waynesburg that day. Before the cause was tried in court, that witness died, and the plaintiff offered to prove what he swore before the arbitrators. The witness by whom it was offered to be proved, having been asked whether the witness before the arbitrators spoke of the date, independently of his book, answered, "I can't remember that he undertook to speak of any date independently of his book entry which he opened."

The defendant objected to the evidence on the ground that the book was not produced. The objection was overruled and exception taken by the defendant.

*John Haman*, who had purchased a share of the estate of *Philip Powell*, deceased, executed a release of it at the bar to one of the other heirs, and was offered as a witness; to which the defendant objected, but the testimony was admitted, and exception taken by defendant.

The plaintiff had procured a statement in the hand writing of *Mr. Ralston*, of Philadelphia, of money which the defendant *Cox* had received there. The defendant gave notice to the plaintiff to produce it before the arbitrators; it was there produced and read in evidence without objection. The same paper was produced in court on notice, and the defendant offered it in evidence on the ground that it had been admitted before the arbitrators without objection. The plaintiff objected to it, the court overruled it, and sealed a bill of exceptions at the instance of defendant.

*Alexander and Potter*, for plaintiff in error.

The witness before the arbitrators spoke from the entry in his book, it was an essential part of his testimony which we had a right to see; giving evidence of what the witness swore, without the production of the book, was giving parol proof of what was in writing. *Juniata Bank v. Brown*, 5 Serg. & Rawle, 228.

*John Haman* should not have been permitted to testify; he was one of the heirs of *Powell* for whose use the suit was prosecuting; he had been the party interested—had been engaged for several years preparing for the trial, had all his feelings embarked in it, and upon the trial, he transfers his interest in the suit to a third person, and does not release to the party in the cause. He being a party in interest, was liable for costs, although not nominally a party, and he could not release himself from that liability.

The paper in the hand writing of *Mr. Ralston*, would have shown where the defendant got the money for which the receipt was given; and having been read in evidence before the arbitrators without objection, and then produced in court by the plaintiff, it was competent evidence.

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*Blanchard* and *Hale*, for defendant in error, whom the court declined to hear.

The opinion of the court was delivered by

HUSTON, J.—Of the nine bills of exception to testimony, sealed by the court below, at the instance of the defendants counsel, only three were relied on in this court. The suit was brought by *Norton* and *Hanawalt*, in the lifetime of the latter, to recover the price of a tract of land, sold by them, under an order of the Orphans' Court, as administrators of *Philip Powell*, to the defendant. *John Haman* was entitled to the share of one of the heirs of *Powell*, and having executed a release of his interest to another of the heirs was admitted as a witness. We have in this state admitted the plaintiff in the cause after suit brought; or what is the same thing in substance, a man who contemplates bringing a suit, has been permitted to assign his interest, and be a witness. I have always believed, and experience strengthens this belief, that by so doing, we have not improved the administration of justice. But this is not that case. *J. Haman*, was perhaps, not at all interested in the suit trying. The administrators and their bail were liable to him whether they recovered or not: but he was not at all events a party—not liable for costs, and not effected, except so far as the plaintiff would be less able to pay, if he did not succeed in this suit: for it must be remembered, that the whole matter in dispute was the amount paid by the defendant to the plaintiff: or in other words, whether a receipt produced by the defendant was the receipt of the plaintiff. After the release, *Haman* was a witness within all the decisions in this and other states, made since releases by witnesses were known.

This cause had been tried under our act of assembly before arbitrators, and on that trial, *Anthony Elton* had been examined as a witness; he was now dead; what he swore was proved by a witness in this cause, viz: That on the 22d day of October, 1824, he had *George Hanawalt's* horse in *Waynesburg*, (the receipt was dated on that day,) that *George Hanawalt*, brought the horse to the shop himself, and that it was in the afternoon of that day. Witness added, Mr. *Elton* brought in his day book, and had it open when he gave his testimony, and said "I cannot say that he relied on his book and not on his memory; I don't remember, and I can't remember that he undertook to speak of any date independently of his book."

The objection to this evidence was, that the book might have been produced in court at the time the witness gave this testimony. If Mr. *Elton* had been alive, and giving testimony, and had said he could fix the time, from an entry in his day book, there might have been some pretence that the other party on their cross examination should have the advantage of seeing the day book and the entries, and the regularity of those entries. Though I do not

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know that such has been the practice. A witness called to fix a date, often says, he has referred to his books after he had been subpoenaed, as to the date of a deed, note or receipt given at the time, and such book or paper is sometimes produced, and sometimes not. That is not this case; here Mr. *Elton* was dead, and what he said was to be proved, *not the ground of his belief or why he said so*. The witness might not know the writing of Mr. *Elton*; might have never seen the inside of this book; not know it again if produced. All that he offered to do, was to prove in court what Mr. *Elton* had sworn, that he undertook to do, and was permitted to do, and there is no error in receiving the testimony.

After very much testimony *pro* and *con* had been given as to this receipt, (which was dated 22d October, 1824, and for eleven hundred dollars.) The plaintiff called a witness who stated, and no objection taken to it, "*Cox* stated he had got the money in Philadelphia, and had lent it to Mr. *Hammond* or Mr. *Lusk*; that he had it at the bank, and had borrowed some from a man in Millers-town; he said that was the money he paid to *Hanawalt*." A third person had procured in Philadelphia a statement from *R. Ralston*, of payments made to the defendant, on account of a legacy, viz: in March 1823, five hundred dollars, in June 1823, nine hundred and twenty-five dollars, and had given this to the plaintiff's attorney. When the cause was before arbitrators, the defendant's counsel had asked the plaintiff's for this paper, after stating that he had no right to it, he however gave the paper and it was shown to the arbitrators. After the appeal, viz: at the trial in court, the defendant called for this paper; plaintiff's counsel said he had it, but would submit to the court whether it was evidence, and handed it to the court, who after looking at it, gave it back, and decided it was not evidence, and clearly it was not; it was in three lines having no reference to this or any other cause; a mere short memorandum, not sworn to, nor even certified to be correct; but it was argued here, that having been before the arbitrators, that made it evidence on the appeal. If whatever is admitted by arbitrators, produced and not objected to before arbitrators, is to be evidence on the appeal, it will make a great alteration in the rules of evidence in our courts, or rather we will have a different set of rules in every case of appeal. When ever an account is admitted to be due, or a paper to be genuine, before arbitrators, perhaps, the proof of this may generally be evidence in court. The admission or confession of the party is almost always evidence, no matter where it was made. This is not that case. Arbitrators under our act of assembly, are the judges of what is admissible as evidence, as well as of the weight and effect of that evidence; no bill of exception to testimony is taken before them, the only redress from any and every error of theirs is the appeal to court, and this appeal is given as much for the purpose, that the last solemn final decision

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of the cause may be had on legal testimony, and nothing but legal testimony, as for any other purpose. Much is heard by the arbitrators which ought not to go before them, to contend about the admissibility of evidence before men unacquainted with the rules of evidence, and the principles on which they are founded, is irksome, useless sometimes, and not seldom injurious to the client; if the cause is decided erroneously, the party appeals, and the counsel know, and must know that in court on the appeal, no other evidence will or can be received, except what ought and would have been received, if it never had been before arbitrators. The confessions or admissions of a party are generally evidence against him, no matter when they are made, but paper statements, parol or hearsay evidence from third persons, or by witnesses, are to be decided on by fixed and settled principles.

It was said, however, that the party here was surprised; that if he had not believed this paper would be produced, and read without objection, he would have taken the deposition of *R. Ralston*; but he had no right to believe any such thing; it is a first attempt to alter the law in this respect, and the alteration attempted is too pregnant with evil, to receive any sanction from this court. That *Ralston* paid defendant five hundred dollars, and nine hundred dollars, at the periods of eighteen and fifteen months before the date of this receipt, was very weak evidence, if evidence at all, of the payment claimed by the defendant. If a man could get clear of a debt by proving that he had once the means of paying it, we should have a new chapter of evidence, and new principles of decision; and the debts of those who are rich, or who are in a business by which much money passes through their hands, would be easily paid; in general such proof would not be admissible. But it is said in this case the plaintiffs themselves had given some evidence on this subject, and had introduced it. But now the plaintiff seems to have admitted the fact, that he got money in Philadelphia; but they had proved that the defendant said he had lent that money. The man to whom he said he had lent it (*Mr. Hammond*,) was in court, a witness in the cause; he could tell whether he ever had it, or repaid it, Millerstown was in the adjoining county; the man from whom he got the money there was not offered; the bank was in town, its officers or books were not resorted to; there was no attempt to give the only material evidence on this point; (I do not say it was evidence unless plaintiff had proved something which made it so,) nor of giving evidence directly bearing on what plaintiff had proved; it is a sheer attempt to subject the Common Pleas to the rules and practices, and irregularity of trials before arbitrators. The court below were right on this point also.

Judgment affirmed.

**PATRICK M'KENNAN and JAMES HENDERSON against  
STEPHEN DOUGHMAN.**

All agreements for the sale and purchase of land, are consummated and extinguished by the deed.

If therefore the grantor makes a deed to the grantee, which contains a general warranty of title, he cannot afterwards show by parol, that an agreement was made a few days before, that the grantee was to patent the land.

The purchase money due the commonwealth, is an incumbrance which may be set up as a defence to the payment of bonds given for land, which the grantor covenanted to convey clear of incumbrances.

WRIT of error to Mifflin county.

This was an action of debt brought by *Stephen Doughman* against *Patrick M'Kennan* and *James Henderson* on two bonds, one conditioned for the payment of fifty pounds on the 1st April, 1822, the other for the payment of sixty-two pounds ten shillings, on the 1st April, 1823. These bonds having been read to the jury the plaintiff rested.

The defendants then proved that the consideration of the bonds was a tract of land sold by *Doughman* to *M'Kennan*, and produced the deed therefor, dated 1st April, 1815, which contained a general warranty of the title. The defendants then further showed by certified copies and certificates from the land office, that the purchase money was still due to the commonwealth, and that no patent had ever issued for the land.

To rebut this, the plaintiff offered to prove that the bargain between him and *M'Kennan* was, that *M'Kennan* was to patent the land himself.

To this evidence the defendants objected: the court admitted the evidence and sealed a bill of exception.

The witness then said: "In the last week of March, or first of April; 1815, he met *M'Kennan*, who told him that *Doughman* had thrown off two hundred dollars from the price of the land for patenting it—the witness told him he thought he had made a good bargain, in getting two hundred dollars for that." On his cross-examination, the witness said, "when this conversation took place, *M'Kennan* was then at the bank to get the hand-money to pay *Doughman*."

A witness who was present at the execution of the bonds and deed testified, that there was nothing said about the patenting then.

The defendants' counsel requested the court to charge the jury, "that if they believe that the conversation which took place between *M'Kennan* and the witness was before the execution of the deed and bonds, all previous agreements between the parties were

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consummated by the deed, and the defendants have shown a good defence to the amount of the patenting money."

To which the court in substance answered, "That if the jury believed the parol evidence, and that the agreement between McKennan and Doughman was, that McKennan was to pay for patenting the land, such agreement would not be extinguished by the execution of a deed containing a clause of general warranty. That the patenting money was an incumbrance upon the land; and if the jury disbelieved the parol evidence, they should default the amount thereof from the bonds: if they believed it, they should find the whole amount of the plaintiff's claim."

The admission of the parol evidence, and the opinion of the court were assigned as error.

Fisher, for plaintiff in error.

The conversations, as testified by the witness must have been before the execution of the deed, and if so, should not have been received: for all contracts and understandings between the parties were consummated by the deed. No fraud in its execution was alleged; parol evidence was therefore inadmissible, *Thompson v. White*, 1 Dall. 424. *Snyder v. Snyder*, 6 Bin. 483. *Wallace v. Baker*, 1 Bin. 810. *Gilpin v. Consequa*, 1 Peters C. C. Rep. 85. *Dinkle v. Marshall*, 3 Bin. 587. *Heagy v. Umberger*, 10 Serg. & Rawle, 339. *Christ v. Diefenbach*, 1 Serg. & Rawle, 464. *Hann v. Halbach*, 14 Serg. & Rawle, 159. *Hamilton v. Asslin*, 14 Serg. & Rawle, 448. *Christine v. Whitehill*, 16 Serg. & Rawle, 98. *Bollinger v. Eckert*, 16 Serg. & Rawle, 422.

Hale, for defendant in error.

The parol evidence may have been received to explain fraud or mistake; for the warranty had been special and was made general by an interlineation. What takes place at and immediately before the execution of a deed may be proved by parol. *Campbell v. McClenahan*, 6 Serg. & Rawle, 171.

The opinion of the court was delivered by

SMITH, J.—(His Honor here stated the facts of the case.) The exception to this decision, brings before us the question, (and it is the only one in the cause,) whether the parol evidence offered, was admissible on principles heretofore decided and recognized? It is to be remembered the evidence was not presented to prove what actually passed between the parties, at the time of or immediately before the execution and delivery of the bonds and deed; nor to prove any trick, or fraud practiced by the grantor, nor any mistake by the person who drew the bonds or deed. It was offered on the broad ground, to show, that a few days before the bonds and deed were executed, some parol agreement was made between the parties, by which McKennan was to patent the land. It does not appear, that any thing was said by the parties on the subject,

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when the deed and bonds were executed; no article of agreement was then produced; no mistake of the scrivener pretended; no allegation, that he was misinformed by any of the parties, or that he misunderstood, or disobeyed his instructions: on the contrary, it appears, that the deed was amended just before the execution, for the purpose of embracing the covenant of general warranty above stated: this then is the naked case, in which parol evidence was admitted, to contradict and control the express covenant of a deed, freely executed and delivered, and as freely accepted; which is contrary to the general rule, always adhered to in this state, with very few enumerated exceptions, that parol evidence, shall not be admitted to destroy, control, add to, or alter a written instrument. Here, the deed, altered and amended, at or immediately before the execution, was clearly the consummation of all previous bargaining, and contained the final intent and agreement of the parties. These principles long since decided, have often been recognized by this court, particularly in *Cozens v. Stevenson*, 5 Serg. & Rawle, 421, and in *Collam v. Hocker*, 1 Rawle, 108.

Judgment reversed, and a *venire facias de novo* awarded.

ELI DIEMER, Register, for the use of PETER SECHRIST,  
against CHRISTIAN SECHRIST.

A presumption of satisfaction from lapse of time, arises in the case of an administration bond; and the computation runs from the period when the money was demandable.

WRIT of error to the Common Pleas of Mifflin county.

This suit was brought on the administration bond of the defendant, *Christian Sechrist*, one of the administrators of *Christian Sechrist*, Sr. deceased, by *Peter Sechrist*, one of the heirs.

The plaintiff gave in evidence the bond dated 10th May, 1797; the inventory amounting to seven hundred and forty-five pounds sixteen shillings and two pence, filed 15th August, 1797; an administration account of the defendant and his co-administrators, filed 7th January, 1803, showing a balance in the hands of accountants, of one thousand four hundred and fifty-six pounds eighteen shillings and ten pence; and also, their supplementary administration account, filed the 20th August, 1805, showing a balance in their hands of one thousand five hundred and eighty-five pounds seven shillings and ten pence.

The plaintiff having given this evidence, the defendant's counsel requested the court to instruct the jury, that the common law limi-



(Eli Diemer, Register, for the use of Peter Sechrist, v. Christian Sechrist.)  
tation was a bar to the plaintiff's recovery under the evidence given.

The court, (*Burnside*, president,) being of this opinion, a verdict and judgment was rendered for the defendant.

The opinion of the court was assigned as error.

*Wilson and Potter*, for plaintiff in error.

An administration bond is not embraced within the reason of the law which bars a recovery after twenty years. In this bond, there is no time fixed for the payment of the estate to the heirs. Although the defendant settled an account in 1803, and again in 1805, yet these accounts do not appear to have been a final settlement of the estate; he has never been discharged by the Orphans' Court, and is therefore, yet the administrator of the estate of the deceased, and may have recovered money of the estate, up to the time when this suit was brought. An administrator is a trustee, and holds the estate in trust for the heirs, and on this ground the limitation does not apply; for although an administrator may plead the statute against a creditor, yet he cannot do so against the heir or next of kin. *Decouche v. Savetier*, 3 *Johns. Chan.* 190. *Arden v. Arden*, 1 *Johns. Chan.* 313. *Norton v. Turvill*, 2 *Peer Wms.* 145. *Farrington v. Knightly*, 1 *Peer Wms.* 549. *Johnston v. Humphreys*, 14 *Serg. & Rawle*, 394. *Kane v. Bloodgood*, 7 *Johns. Chan.* 90.

*Hale*, for defendant in error, whom the court declined to hear.

PER CURIAM.—A presumption of satisfaction from lapse of time, arises in the case of every species of security for the payment of money, whether bond, mortgage, judgment, or recognizance; and the computation runs from the period when the money was demandable. The plaintiff was entitled, if not before, yet certainly at the settlement of the administration account in 1805, and without any thing to rebut the presumption, he is clearly too late with his suit in 1826. He relies on the fact that the settlement before the Register was not confirmed by the Orphans' Court; but is there the less room for a presumption of satisfaction, because the administrators were not called on to perfect their account? It is unnecessary to say that the limitation runs from the time when the parties interested are first entitled to demand an account—that point will, when it arises, merit consideration, but we confidently assert that the arrest of a judgment actually in progress, strengthens, rather than weakens the presumption of compromise and satisfaction.

Judgment affirmed.

**WILLIAM P. and T. M. BRYAN against GEORGE M'CULLOCH.**

The oath, upon which to ground a writ of error, must be made by the party, and is not sufficient if made by the attorney.

THIS was a writ of error to the Common Pleas of Mifflin county.

*Hale*, for defendant in error, moved to quash, because the affidavit to ground the writ of error was made by the attorney, and not by the party, as required by the act of assembly.

*Potter*, contra, insisted that a majority of the precedents are in favour of the practice pursued in this particular instance.

Copy of the affidavit:

<i>Bryan</i>	}	<i>W. W. Potter</i> , the attorney and counsel of <i>W. P.</i>
<i>v.</i>		and <i>T. M. Bryan</i> , who do not reside in the county of
<i>M'Culloch.</i>	}	Mifflin, and who were not present at the trial of the

cause, being duly sworn, doth depose and say, that the above writ of error is not applied for, for the purpose of delay.

*W. W. Potter.*

Sworn and subscribed the 22d January, )  
 1819, before me, an associate judge of )  
 Mifflin county. *John Oliver.*

**PER CURIAM.**—The decisions on this point have been inconsistent, because it was not deemed sufficiently important to receive much consideration; and convenience requires that the practice in regard to it be settled. We have therefore carefully examined the words of the act, and find that they peremptorily require the affidavit to be made by the party. This will doubtless occasion no small degree of trouble and perhaps vexation; but were we to be drawn from the plain directions of the law by any thing less than absolute necessity, it would be impossible to predict the point at which we should stop. Shall the attorney be authorized to make the oath in all cases; or only where his client resides out of the county, or out of the State, or out of the United States? These are questions which none but the legislature can solve; and it will, no doubt, interfere to remove any serious inconvenience that may be felt. In the mean time it is our business to execute the law as we find it; according to which it is clear that the writ of error issued improvidently.

On hearing the opinion of the court, *Hale* said that as his object was only to have the practice settled, he would, with the leave of the court, waive his objection; and the motion to quash was withdrawn.

**GEORGE M'CULLOCH against JOHN SAMPLE and NANCY SAMPLE, executors of FRANCIS SAMPLE, deceased.**

Executors who were authorized to sell the real estate of their testator, for the payment of certain legacies, sold the same, and afterwards settled their account in the Orphans' Court, by which it appeared there were assets to pay the legacies: the legatees afterwards filed refunding bonds, and brought suits against them as executors, and obtained judgments: *Held*, That such judgments are not liens on the real estate of the executor.

**ERROR to the Common Pleas of Mifflin county.**

This was an issue directed by the court, in pursuance of the act of assembly, to try the right to money in the hands of *George M'Culloch*, Esquire, sheriff, which was made out of the sale of the real estate of *Francis Sample*, deceased.

The property was sold for three thousand three hundred and fifty dollars, and after the payment of a judgment of the *Huntingdon Bank, v. Francis Sample*, and the costs of sale, there remained five hundred and twenty-eight dollars and eighteen cents in the hands of the sheriff, which was claimed by the plaintiffs below as the executors of *Francis Sample*, deceased, as whose property the land was sold, on the ground that there was no lien upon the property payable out of the proceeds of sale, except that of the *Huntingdon Bank*.

*David Cummins, Charles Cummins and William Cummins* claimed the money on the following grounds. *David Sample* died, having first made a will and testament, by which he appointed *Francis Sample* and *David Sample*, his sons, to be his executors, and authorised them to sell his real estate, and *inter alia* bequeathed certain legacies to his grand children, the said *David Cummins, Charles Cummins and William Cummins*. The said executors sold the real estate of their testator in 1801, and in 1806, settled an administration account, by which it appeared there was a large balance in their hands. In 1819, *David, Charles and William Cummins*, each filed refunding bonds, and brought suit against *Francis Sample and David Sample*, executors of *David Sample*, deceased, to recover their legacies under the will of their grandfather; and on the 11th December, 1819, each obtained a judgment for two hundred and sixty-nine dollars and twenty-three cents, and each issued a *fiery facias* to November term, 1820, against the estate of *David Sample*, deceased, which were returned "not executed," and *alias fiery facias* were issued in 1823, and were returned "*nulla bona*."

*David, Charles and William Cummins*, in the court below contended, that these three judgments were liens on the estate of *Francis Sample*, under the act of 21st March, 1772. And secondly. If they were not, the court would, in the exercise of their equita-

(George McCulloch v. John Sample and Nancy Sample, executors of Francis Sample, deceased.)

ble powers, decree the money to them, under the special circumstances of this case.

But the court, (*Burnside*, president,) being of a different opinion, instructed the jury, that the executors of *Francis Sample*, were entitled to the money in the hands of the sheriff, after the payment of the bank judgment; and they found accordingly.

*Potter*, for plaintiff in error. When assets come to the hands of an executor, he is personally liable to a creditor or legatee of the estate. In this case the claim was not made against the estate of *David Sample*, deceased; for his whole real and personal estate, by the direction of his will, had long before been converted into money by his executors, which remained in their hands and for which they were liable; and did charge themselves in the settlement of their administration account.

By the 3d section of the act of 21st March, 1772, *Purd. Dig.* 517, it is provided, that when there is a plea of no assets by an executor certain proceedings shall take place, by which the amount of the assets shall be ascertained: judgment shall then be entered to remain as security; it is reasonable that this security shall be against the estate of the executor, who gives no bail; and particularly in this case where there was no estate of the testator, which could have been secured by the judgment: here the executors admitted by their settlement in 1806, that the assets were in their hands, upon which our judgment was obtained. On this point were cited *Wilson v. Wilson*, 3 Bin. 557. *Isett v. Brenizer*, MS., Chambersburg, October term, 1828.

A judgment generally against an executor is personal. *Griffith v. Chew*, 8 Serg. & Rawle, 17.

*Fisher and Hale*, for defendants in error. It would be contrary to legal principles, that when an executor is sued in his representative capacity, declared against as such, and judgment on that declaration, that that judgment should bind him personally. Executors, by a proper proceeding against them, may be made personally liable, but that proceeding has not been pursued in this case. *Commonwealth v. Rham*, 2 Serg. & Rawle, 375. *Guire v. Kelly*, 2 Bin. 294. *Clark v. Herring*, 5 Bin. 33. In *Wilson v. Wilson*, the declaration was against the executor personally.

*Potter*, in reply. A proceeding to prove a *devastavit* can only be instituted by a creditor, and not by a legatee: but why should either one or the other institute a proceeding to ascertain that which the executors always admitted and put on record by the settlement of their accounts.

The opinion of the court was delivered by

ROGERS, J.—Whether an action for a legacy may not be supported, under the implied promise to pay, arising from the consid-

(George M'Calloch v. John Sample and Nancy Sample, executors of Francis Sample, deceased.)

ration of assets, it is unnecessary to decide. In *Clark v. Herring*, 5 Bin. 33, it was ruled, "that assets are a sufficient consideration for a personal promise by one who is executor, to pay a legacy and charge him *de bonis propriis*. And in *Isett v. Brenizer*, it would seem to have been the opinion of the court, that an action may be maintained against an executor, personally, on a promise implied, from the consideration of indebtedness. However this may be, the legatee may elect to bring suit against him in his representative character, and this it is believed is the usual form; in which case the judgment is *de bonis testatoris*, and not *de bonis propriis*. And in this I do not agree with the reasoning of the chief justice in *Isett v. Brenizer*. The legatees brought this suit against, *Francis and David Sample*, as executors of *David Sample*, deceased. The cause was referred, and the arbitrators awarded generally in favour of the plaintiff. As there was no declaration or statement filed, the judgment follows the nature of the writ, and is a judgment against them in their representative, and not their personal character. The *fi. fa.* pursues the judgment, and in short there is nothing on the record which indicates any intention of considering the executors personally liable for the debt. On the contrary, no person, who might search the docket for incumbrances, would for a moment have supposed, that the judgment bound the individual property of the executors. *Wilson v. Wilson*, 3 Bin. was a suit for a distributive share, in which the writ, and the recital in the declaration, was against the defendant as executor, but the count was on a promise in his individual character. And this constitutes the difference between the cases; for it was the count which controlled the writ, and rendered *Wilson* personally liable on the judgment. It could not have been pretended that he would have been personally bound, independently of the declaration, and that by virtue of the count, in which he is charged individually. Had the plaintiffs filed a declaration or statement, with the proper averments, as in *Wilson v. Wilson*, there would have been room for the argument, that his being stated to be executor, should be rejected as surplusage. As the defendants were sued as executors, judgment recovered against them as executors, and execution was issued against them in the same capacity; we are of the opinion this judgment should be affirmed.

Judgment affirmed.

Gibson C.J. dissented - see 2 P. R. 494

CHRISTIAN GRO and JOSEPH TOWNSEND *against* The HUNTINGDON BANK.

A creditor who has obtained judgment against the principal, against the indorsers, and against the absolute bail of the principal, and has issued execution and levied upon the land of the principal or of the absolute bail, may, nevertheless have execution of the chattels of the endorsera. Nothing but actual satisfaction can prevent him.

The bare seizing of land in execution to the value of the debt, is not a satisfaction.

WRIT of error to the special Court of Common Pleas of Mifflin county, (*Reed*, president.)

The Huntingdon Bank loaned one thousand dollars to *Robert Burns*, for which they took his note with *Christian Gro* and *Joseph Townsend*, endorsera. To April term, 1817, the bank obtained a judgment against *Robert Burns*, and also to the same term against *Christian Gro* and *Joseph Townsend*; after judgment was obtained against *Robert Burns* the principal, *Hugh Burns*, *John Rothrock* and *James Robinson*, went his absolute bail for the money, in order to obtain the stay of execution for one year. After the year had expired, *Burns*, *Rothrock* and *Robinson* were sued on the recognizance by the bank, and judgment obtained against them, upon which a *fi. fa.* was issued and levied upon the land of the defendants; an inquisition was held thereon, and it was extended. Subsequently a *fi. fa.* issued upon the judgment against *Christian Gro* and *Joseph Townsend* which was levied upon the land of *Christian Gro*, whose counsel moved the court to set aside the execution on the ground that property of the absolute bail had been levied to an amount sufficient to pay the debt, interest and costs. But the court being of opinion that the bank had a right to proceed against both, until it received satisfaction, refused to set aside the execution against *Christian Gro*, and this writ of error was sued out.

*Fisher*, for the plaintiff in error.

The bank had no right to issue a *fi. fa.* against *Gro*, the endorser, until it had exhausted the judgment, execution and levy of the property of the absolute bail. *Bank of Pennsylvania v. Latshaw*, 9 *Serg. & Rawle*, 9. *Hunt v. McClure*, 2 *Yeates* 387. *Clerk v. Withers*, 2 *Ld. Raym.* 1073. *Windham v. Withers*, 1 *Strange*, 515. 2 *Wil. Bac. Ab.* 717, title *Execution*. *Lancaster v. Fielder*, 2 *Ld. Raym.* 1451. *Chitty on Bills*, 443. *Hayt v. Hudson*, 12 *Johns. Rep.* 207. *Barnet v. Washebaugh*, 16 *Serg. & Rawle*, 410. *Commonwealth v. Lebo*, 13 *Serg. & Rawle*, 175. *Lawrence v. Pond*, 17 *Mass.* 433. *McLelland v. Whitney*, 15 *Mass.* 137. *Ladd v. Blunt*, 4 *Mass.* 403. Upon principle, it would be wrong, to permit a plaintiff to take out several executions, and upon each to levy property enough to pay the debt; because if the sheriff levies he must sell; he is commanded

(Christian Gro and Joseph Townsend v. The Huntingdon Bank.)

so to do; he has no right to judge or know that two or more executions are to satisfy the same debt.

*Hale*, for defendant in error,

Admitted that a levy upon *personal* property to an amount sufficient to pay the execution, was a discharge of the debt; and that the authorities read on the other side very fully established that rule of law; but still contended, that the idea, that a levy upon land was a satisfaction of the debt, never was printed in a book.

*Fisher*, in reply—read, *McCulloch v. Gitnier*, 1 *Bin.* 214. *Morris v. Griffith*, 1 *Yeates*, 189.

PER CURIAM—Levying the lands of bail, is not distinguishable from levying the lands of the principal; so that the question is whether a creditor who has levied the land of the drawer of a note, may nevertheless have execution of the chattels of the endorsers. Nothing but actual satisfaction can prevent him; and accordingly the argument is that a levy is satisfaction. It is clear, however, that the bare seizing of land in execution to the value of the debt, is not so. A condemnation of the land might have given colour to the argument; but the rents and profits having been found sufficient to produce satisfaction in seven years, the creditor was at liberty to proceed to an extent or not, at his election, and having declined to take satisfaction out of the profits, it is clear the debt remains. Whether, however, a mere refusal to stay proceedings be properly the subject of a writ of error, is a point which has not been made, and on which we forbear to intimate an opinion.

### (JAMES M'CONAHY *against* The CENTRE and KISHACO- QUILLAS TURNPIKE ROAD COMPANY.

Satisfactory proof of the loss of a written advertisement must be given, to lay a ground for the admission of the advertisement copied into the newspaper. A charter of incorporation cannot be declared void in a collateral suit, it can only be vacated by a *scire facias* to repeal it; or on a writ of *quo warranto*, at the suit of the commonwealth.

An agreement between commissioners authorised to take subscriptions of stock, that a certain number of shares of fictitious stock shall be subscribed, in order to enable them to obtain a charter, is a fraud upon the *bona fide* subscribers, which will relieve them from any obligation to pay. A declaration made by a third person, in the presence of the commissioner, to one about to subscribe for stock, that he can pay his subscription in work, and this not objected to at the time by the commissioners, must be taken as his declaration; and there is no distinction between the commissioner and the corporation, in regard to this promise.

WRIT of error to the special Court of Common Pleas of Mifflin county.

This suit was brought by the *President, Managers and Company of the Centre and Kishacoquillas Turnpike Road Company v. James*

(James M'Conahy v. The Centre and Kishacoquillas Turnpike Road Co.)

*McConahy*, to recover the amount of stock in said company subscribed by him, and which had been called in by resolutions of the said company.

The whole case appears so fully in the opinion of the court, that any other statement is unnecessary.

*Fisher and Blanchard*, for plaintiff in error.

*Wilson and Potter*, for defendants in error.

The opinion of the court was delivered by

SMITH, J.—This case again comes before this court for decision, and I regret that we are a second time under the necessity of reversing the judgment of the court of Common Pleas. It was an action of *assumpsit*, brought by the defendants in error, against the plaintiff in error, the defendant below, for the amount of his subscription of five shares of fifty dollars each, to the stock of the Centre and Kishacoquillas turnpike road company. On the trial of the cause, after the plaintiffs below, had given some evidence in support of their action, they offered in evidence a newspaper, called the "Juniata Gazette," of the 20th of November, 1821, in which there was an advertisement, purporting to have been signed by the defendant, with six others, calling a meeting of the stockholders, to hold an election for officers to organize the company, for the purpose of showing that *James McConahy* had accepted the charter, and had acted under it. To the reading of this paper, the defendant objected; the plaintiffs then called *William Mitchell*, who proved, that he had printed the paper, and had regularly issued it; that it was not his custom to preserve original advertisements, and that he never did preserve them: that he had told the defendant he had not the original, nor any papers among which he could look with any hope of finding it, that he thought the old papers of the office were destroyed among waste paper, shortly after the publication; and that some of the advertisements he had taken from the Bellefonte paper; but could not say as to this, nor that it was, or was not, copied from the last mentioned paper: that if he copied it from a written paper, it was either destroyed or lost, but that he had not hunted for it, as he had no place he could look with any prospect of finding it. He also proved, that the defendant was one of his subscribers, and took his paper at the time. The defendant, however, still objected to the reading of the paper, alleging there was no proof, that the defendant had signed it, or authorised it to be printed, or knew any thing of the transaction, that the original should have been produced, or its loss proved; and that the seven first commissioners should have given the notice, not the seven first subscribers. The court overruled the objections, and admitted the newspaper in evidence. An exception was taken to this opinion of the court, which forms the first error complained of.



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The question was, whether *James M'Conahy* had signed the advertisement, or authorised its publication. If it had merely been, whether he had notice of a fact published in the newspaper, the fact of his taking the paper, in which it was published, might have been submitted to the jury; but, I take it, that in this case, the original paper, signed by the person, ought to have been produced, or its loss proved, and if its loss had been legally proved, then proof that the defendant had signed it, or proof, that he *knew* of it, and had agreed, that some other person should write the advertisement and put his name to it, would have been sufficient. But the evidence did not prove the fact, that the defendant had advertised, or sanctioned the advertisement; indeed, there was no legal evidence to show, that due diligence had been used to procure the original, or to account satisfactorily for the want of it, in truth, the witness said he had not looked for it, as he had no prospect of finding it. This was not a sufficient reason to supercede the necessity of a search, and a diligent search might have been successful. The defendant moreover was not one of the commissioners, he was only a subscriber, and as such was not entitled to advertise; the commissioners alone were directed to perform this duty. See *Pamph. Laws of 1821, page 75*, and *Pamph. Laws of 1826, page 349*. We therefore think that the admission of the newspaper was wrong. The decision in the case of *Sweigart v. Reisinger's Administrator*, 14 *Serg. & Rawle*, 203, on a similar point, goes far to determine this part of the case.

After the plaintiffs had read the advertisement to the jury, they gave further evidence to prove, that the defendant had constituted a proxy to vote at the first election of the company for officers; they also proved the amount of the cost of the road, and its annual toll, and then rested their cause.

The court permitted the plaintiffs to prove by one of the commissioners, that he saw the defendant sign for his five shares, at Mr. *Reynolds'* tavern, that the commissioners had obtained all the stock they could, after the act of 1821, called the general appropriation act, had passed, giving this road twenty thousand dollars. This witness also proved, that he had calculated the probable expense of the road, and was satisfied, that they had a sufficient sum subscribed, taking in the twenty thousand dollars from the State, or perhaps more; that thereupon the commissioners met at *Kerr's*, at which meeting, all or nearly all were present, and the calculation laid before the commissioners, and they were all of opinion, that no more stock could be obtained, but that with the State stock, they would have enough: that it was debated, whether they should get the amount of individual stock reduced, or get the amount required by the act, by adding *fictitious* stock, so as to obtain the charter, and enable the company to go on. The commissioner then filled up the certificate, or in part signed it in blank, when the other commis-

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sioners took it, and were to get it completed, and this was the last act the witness did, in relation to the company, except paying stock. The witness also proved, that he saw a subscription of the board in a book of fictitious stock, and that the first suggestion of taking fictitious stock, was in Lewistown. There were from two hundred and ninety to three hundred shares of good stock, about half the amount required. The act of assembly required six hundred shares, before a charter could be obtained. The witness declared they were right in their estimate; for the good shares were amply sufficient, with the twenty thousand dollars to make the road. He could not say, that he ever told the defendant that three hundred shares would be enough, but he often had repeated the declaration. On his cross examination, the witness said, "there was no other commissioner but myself present," (when Mr. Reynolds took pains with Mr. M'Conahy to induce him to subscribe,) "he took more pains with him, than I did; I put him more particularly under his care."

The defendant also proved, by another witness, that while he was taking stock in 1821, with the commissioner, he was anxious to have stock taken, and that he was requested to speak to the defendant for this purpose; that he did so, and took him into the room, in which the commissioner was; that the defendant refused to subscribe, and that then the witness urged as a means to induce the defendant to subscribe, that he could pay it in black smith work, that the defendant had before refused, alleging he was not able: that he prevailed on him to subscribe, he believed by holding out the inducement of paying in work; his treaty with the defendant was in the presence of the commissioner, who, however, did not say any thing, and was not appealed to. Being cross examined, the witness could not remember the manner he had pointed out, of the defendant's getting the work, but that he had referred to his labour, as a means of getting money to pay, and said it would be their interest to collect in work, that there was no stipulation by the commissioner, that the company would take work; the matter was principally left to the witness.

This closed the testimony on both sides, when the following points were submitted to the court by the parties, to wit, the plaintiffs requested the court to instruct the jury:

"1st. If the jury believe that the defendant advertised, as one of the first seven stockholders named in the charter, for an election, signed a proxy and voted at the election by proxy, on the 3d of December, 1821, it would be conclusive evidence, in point of law, of his acceptance of the charter, and the plaintiffs would be entitled to recover.

"2d. That the act of the 10th of April, 1826, and of the 1st of April, 1823, validates the subscription of the defendant, and places

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him in the same situation as if no fictitious stock had been obtained.

"3d. That even if the stockholders would take advantage of the fictitious stock, yet the defendant by his acts of voting by proxy, advertising, &c. cannot now set it up as a defence in this suit."

The defendant requested the court to instruct the jury:

"1st. That if they believe *M'Conahy*, the defendant, did not know that fictitious stock had been certified to the governor, when he gave his proxy to *James Milliken*, then that proxy cannot affect the defendant.

"2d. If the jury believe, that the advertisement, for the election for managers, of the first seven subscribers, was done without the agency of *James M'Conahy*, the defendant, but by other persons using his name, then this advertisement cannot in any way affect him.

"3d. If *James M'Conahy* was induced to subscribe five shares of stock, for which this suit was brought, under the promise of paying in black-smith work and other work, the plaintiffs should have made a demand of this work before they could sustain this suit.

"4th. That if the jury believe, at the time *M'Conahy* subscribed his five shares, and at the time the advertisement for the election, and at the time he gave his proxy to *Milliken*, he was ignorant that fictitious stock was certified to the governor, the plaintiffs are not entitled to recover."

These points were generally answered by the court in their charge to the jury, which was as follows, to wit:

"It appears to me, that the three following questions are presented in the investigation of this cause.

"1. Was the charter accepted and confirmed by defendant, if so, he cannot now gainsay it.

"2. If not accepted or confirmed by defendant, was the admission of the fictitious signers of stock, by the commissioners, a fraud upon the defendant.

"3. Was the subscription of *M'Conahy* obtained through fraudulent representations, sanctioned by the agent of the company?

"By the act of 1821, for the erection of this company, Mr. *Burnside* and others, were appointed commissioners to receive subscriptions, so as to enable the subscribers for stock, to obtain a charter of incorporation. The leading public object was to have a turnpike road made from Brown's mills to Bellefonte. It may have been a private object with the subscribers to vest their money in a fund that, besides contributing to the completion of the road, might furnish them an annual interest. The commissioners were as well agents for the public, as for the subscribers. It was, therefore, a duty imposed by interest on the subscribers, to attend to the transactions of the commissioners. The act of assembly was directory upon the commissioners, and they had no legal ability to do any

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thing contrary to the provisions of the act. No charter could have been demanded until all the provisions of the act were complied with; and the subscribers could not be prejudiced by any act of the commissioners, contrary to law. The charter was to be procured *from the government*, for the benefit of *the subscribers*, not for the benefit of the commissioners. If *the subscribers* procured their charter without an exact compliance with the provisions of the law, it was not for those who procured it to complain. The government from whom it was obtained might or might not repeal it at their pleasure. So long as the charter exists unrepealed, and more particularly since the original defects have been expressly waived by the government, by a positive act of assembly, *it exists legally*, and is *of full force and effect* according to its import. The company has a legal right to sustain a suit in their corporate name, and upon the trial, now in progress, on the pleas and issues upon the record, the validity of the charter cannot be enquired into. The court and jury are bound to give effect to the contracts of the corporation, and to *the contracts in subscribing* for stock, made before the date of the charter, so far as such contracts were *fair and honest*, and did not fraudulently affect the interests of such subscribers. If the commissioners did any act contrary to their legal duty, after *James McConahy* subscribed for five shares of stock, without his knowledge or assent, to his prejudice, it would avoid the obligation of his engagement to pay. Two acts are complained of by the defendant as having this effect. First: It is complained that instead of obtaining the subscription of six hundred shares, before a charter was obtained, only three hundred good shares were obtained; and in this way it said the defendant was prejudiced. If *McConahy* had no knowledge of such fact, and he never assented to it directly or indirectly, and it was in prejudice of his rights, his subscription was not binding upon him. But supposing him to be wholly ignorant of the facts in relation to the fictitious stock, and the fact of the charter being obtained upon it, was he prejudiced by it? It is as well a presumption of the law, as the testimony in the case—that it was supposed that the full amount of the *bona fide* subscriptions, together with the State money, would be required to complete the road. And from the terms of the subscription, it was indicated that the subscribers were bound to pay fifty dollars on each share by them respectively subscribed. There were two objects the subscribers probably had in view; one the completion of the turnpike road, the other the vesting of their money in a productive fund. From the testimony it appears that the first object has been fully effected, for the road has been long since made, and the company been in the receipt of tolls for the whole distance. The second object may have been *advanced* rather than *injured* by the contrivance of certifying the fictitious subscriptions. Because if six hundred shares had been subscribed at fifty dollars a share,

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added to the State stock of twenty thousand dollars, it would have amounted to fifty thousand dollars; while three hundred shares at fifty dollars, with the State stock, amounted to thirty-five thousand dollars; if the whole money had been received and expended, as is generally the case, in the one event, the defendant would have drawn his dividend in the proportion his stock bore to fifty thousand dollars; in the other, in the proportion it bore to thirty-five thousand. It is left to the jury to say, whether under all the evidence, the facts in relation to the fictitious stock injuriously affected the engagement of the defendant under his subscription, without his knowledge or assent, directly or indirectly; if so, it would absolve him from his engagement. Where companies have plenty of money they generally spend it liberally; where they have little, it often induced economy. It can hardly be doubted that the principal and leading object of the subscribers was to effect the completion of the turnpike road contemplated. We have it in proof, that after earnest attention to the business, and every diligence used, the commissioners could only obtain about three hundred shares of stock to be subscribed, and the act of assembly requiring six hundred before a charter could be had, they were at a stand, they could not move a step further. The great object of the subscribers was likely to be defeated, and it was only by the expedient resorted to of filling up the list with the names of persons unable to pay, that the charter could be had, or the great work effected. Although as between the government and the subscribers, the expedient resorted to may have been exceptionable, it appears to me it was manifestly for the advantage of the subscribers; indeed it was the only way the commissioners could devise to effect the object at all. The subscribers accepted the charter so obtained; the company was organized, moneys collected, the road made, toll gates erected, and the company now in the receipt of tolls; and the government confirmed the charter, on their part waiving all objections on account of the irregularities alluded to. How, then, was the defendant injured in the affair? He subscribed for five shares. His subscription imports an unconditional obligation to pay the whole, if required. There is no condition precedent expressed in it, and the idea was not held out by the commissioner, as he stated in evidence, that less than the whole would be required. The road was sooner made, and it is said to be well made, and very probably made for less money, by the expedient resorted to, than if the whole six hundred shares had been subscribed by solvent stockholders. *I do not, therefore, see so plainly how the defendant was injured or exposed to injury in this transaction, and if he was not, I see no reason he has to complain.*

"But it is said he accepted the charter, advertised for the election of officers under the charter, and voted at the election by proxy. If he did accept the charter, knowing the facts alluded to,

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his mouth would be closed, and no objection on that account could now avail him. See first point on part of the plaintiffs, and first point on part of the defendant. The advertisement and proxy are evidence to show his acceptance of the charter. But if in truth, he did not know that fictitious stock had been certified to the governor, when he gave his proxy to *James Milliken*, such proxy would not affect him. There is no legal magic in the proxy, it is only as evidence of the fact of acceptance of the charter. If he did so, knowing the facts, he is barred in his defence. If he did not know the facts, the proxy would have no effect. See second point of defendant. The same remarks apply to the advertisement. If it was done without the agency of defendant, by other persons using his name, it would not affect him. It seems it was not his duty to advertise, he was not therefore bound to know the facts in relation to it, any thing thus done in ignorance of a man's rights, or of the facts do not affect him.

"Fourth point of defendant. Such ignorance as is set out in this point, may not be a bar to plaintiff's recovering, if the charter was obtained, the company organized, the work done as intended, and the State has confirmed the charter, waiving all exceptions to these irregularities. If defendant was not injured or defrauded, he would have no right to resist the payment on that ground. See second point on part of the plaintiff. The two acts referred to, do validate the charter, and the subscriptions if *bona fide* made. But if fraudulently obtained on part of the commissioner, this act would not, and could not confirm them. If fraudulent in the beginning, no subsequent acquiescence of the defendant would make them good. It would require a new engagement, or something equivalent. The legislature never intended to give effect to a contract improperly obtained, contrary to the consent of the injured party. The terms of the act only apply to subscriptions, obtained *bona fide* in one act, and in good faith in the other, which is the same thing.

"Third point of plaintiff: If the giving the proxy, voting, advertisement, &c. satisfy the jury that the defendant knowingly accepted the charter, we before said, and now repeat, that his mouth would be closed, but if done without a knowledge of the facts he now complains of, or by others, without his knowledge, defendant would not be affected by it.

"Third point on part of defendant. The commissioner taking the stock, was the agent appointed by law for that purpose. If the defendant was induced to subscribe under a promise or engagement from him, that it should be paid in black-smith work, the plaintiffs should have made a demand of such work before they could sustain this suit. It was the duty of the commissioner to take subscriptions on the terms prescribed by law. Those terms are set out in the writing in the book over the subscriptions, it calls for

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money, not for work, and the commissioner had no power or authority to promise or engage to take payment in work. He might use fair reasoning and argument to induce such subscriptions, but could not use false inducements; but was only responsible for his own conduct in this particular. If others falsely induced defendant to subscribe, if the commissioner had no hand in it, and did not assent to it, it was the defendant's folly, and ought not to avail him. *I would apprehend from the evidence, that no such fraud was practised on the defendant by the commissioner.* But it is a fact to be determined by the jury. Indeed the whole cause depends mainly on the evidence, was the defendant imposed upon, *was* the terms of the agreement altered to his prejudice, was he circumvented by the agent, was any fraud practiced upon him, if so, he stands discharged from the obligation of his engagement. If he knew how the charter was obtained, and assented to it, and voted by proxy for officers under it, or if the fictitious stock was added and certified, even without his consent; if it did not defraud or injure his rights, and if he subscribed voluntarily the written engagement over his name, he is bound to pay. Plaintiffs only claim *thirty* dollars a share with common interest."

To this charge, the defendant excepted, and has here assigned nine errors; some of which have not, however, been insisted on in the argument. The errors are,

1. The court erred in receiving in evidence the newspaper, containing the printed advertisement, as set forth in the *first* bill of exceptions of defendant below.

2. The court said, "was the charter accepted and confirmed by the defendant? If so, he cannot now gainsay it."

3. The court said, "upon the trial now in progress, and the pleas and issues upon the record, the validity of the charter cannot be inquired into."

4. "There were two objects that the subscribers, probably had in view; one, the completion of the turnpike road; the other, the vesting of their money in a productive fund, the second object may have been advanced, rather than injured by the contrivance of certifying the fictitious stock."

5. In saying, "I do not therefore see so plainly, how the defendant was injured or exposed to injury in this transaction; and if he was not, I see no reason he has to complain."

6. "That if the defendant did accept the charter, knowing the facts alluded to, his mouth would be closed, and no objection on that account would now avail him."

7. "That the advertisement and proxy are evidence to show his acceptance of the charter. If he did so, knowing the facts, he is barred in his defence."

8. Court erred in charging on defendants fourth point, in saying, "such ignorance as is set out in this point, may not be a bar to

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plaintiff's recovering, if the charter was obtained, the company organised, the work done as intended, and the State has confirmed the charter, waiving all exceptions to these irregularities."

9. The court erred in charging on the third point of defendant, in saying "the commissioner had no power or authority to promise or engage to take payment in work."

The first error assigned, having already been considered, any further remarks in relation to it, are deemed unnecessary. In delivering the opinion of the court on the remaining errors, I propose to confine myself to such general remarks, as may, on this occasion suffice. The defendant complains, that the court erred, when they told the jury, that the validity of the charter could not be inquired into, in this action. This point came before us, and has already been decided in the case reported in 16 *Serg. & Rawle*, 140, where it was expressly declared, that if the charter had been even fraudulently obtained, it could not be declared void, collaterally, in a suit like the present; it could only be vacated by this court, either by *scire facias* to repeal it or to declare it forfeited, or on a writ of *quo warranto*, at the suit of the commonwealth; and so the court below declared the law; there was then no error in this part of the charge. But if, in obtaining the charter, a fraud has been committed on the defendant in this action, by which he has sustained or might sustain an injury, it is an entirely different question, whether the corporation can sustain this suit. The evidence is positive, full, complete and uncontradicted, that the charter was obtained by means of the subscription of three hundred shares of fictitious stock, in order to make up the six hundred shares, required by law before a charter could be granted, and that a deliberate plan was adopted and pursued to obtain the fictitious stock; and thereby obtain a charter and the twenty thousand dollars subscribed by the State. But there is no proof, nor colour of proof, that the defendant knew of the plan or scheme to put down fictitious names for three hundred shares, or ever knew any thing of the execution of the plan, or that it had been carried into effect. It appears that it was suggested and adopted at a meeting of the commissioners, at which it is not pretended, any stockholder, who was not a commissioner, was present. The defendant was not a commissioner. There is no proof that the subscribers to this stock were informed that three hundred shares, together with the commonwealth's subscription of twenty thousand dollars would be sufficient to make the road, the commissioners, to be sure, were so told, but not the stockholders. Can it then be supposed, that if the stockholders had been informed of the scheme, they would ever have agreed to it? Or have we a right to say, they would have assented? For my own part, I cannot think they would. It was a direct injury to every stockholder who had subscribed, for if six hundred shares had been taken, as the law provided, it is



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evident, that no more than *fifteen* dollars would have been required on each share, whereas by the plan adopted in taking three hundred shares from fictitious subscribers, every real stockholder is called upon to pay *thirty* dollars on each share. I would ask, was it just, was it fair to deal thus with the stockholders. The proof in this cause, I observe, was by one of the commissioners, and he does not state, that the commissioners ever divulged their plan of taking fictitious stock, to the real subscribers, or that any of them knew of it, until after the company was in operation. This, in my opinion, was a fraud on every subscriber, and would excuse him from the payment of his subscription. Let me not be understood, as imputing to the commissioners an intentional fraud, such is not my meaning, I have the pleasure of knowing some of them, and I know, that they are incapable of any such intention. The facts are however, distinctly proved, and nothing is left to inference; it was therefore wrong to refer it to the jury to decide, whether the defendant knew of what was proved to have been done in his absence, and never communicated to him; it was essential for the plaintiffs to establish by evidence the fact of notice, nor could the defendant be called upon, in the first instance to show that there was no notice.

It is contended, that the defendant accepted the charter, and thereby waiving all objections, must pay his subscription money. It is true, a charter was obtained, but the subscribers did not know when or how it was obtained, of the imposition on the government, they knew nothing. They had no direct agency in obtaining it, in fact, the subscribers could not have obtained it, for the commissioners were the persons to certify the necessary facts to the governor, and when this was done, the charter was thereupon granted. I am satisfied, that if a proper application had been made, and the proper mode pursued to repeal this charter, the Supreme Court must have declared it void, as to the State, on account of the imposition practised, or that the State would have been justifiable in refusing to pay their subscription of twenty thousand dollars. The legislature however, having waived their right, the charter is valid as to the State. But, there has been no waiver by the subscribers, who subscribed on the faith of the law, which assured them, that they should contribute with subscribers for six hundred shares, but are afterwards called on to contribute double the sum with half the number of shares. The defendant has not waived any right to resist this imposition so far as he is affected, and he stands discharged, in consequence of the fraud, from his obligation to the company.

The last error assigned is, that the court erred in their answer to the defendant's third point, in saying, that the commissioner had no power or authority to promise or engage to take payment in work. Mr. Reynolds, in the presence of one of the commissioners,

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after the defendant had refused to subscribe, urged, as a means to prevail on him to subscribe, that he could pay it in black-smith work, and on this assurance, obtained the defendant's subscription. This declaration, made in the presence of the commissioner, and not objected to by him, is to be taken as his declaration, nor is it correct to say, that the law draws a distinction between the commissioner and the corporation, in regard to this promise. I hold the promise to be so far binding, on the corporation, as to prevent it from recovering of the defendant contrary to the terms on which he subscribed. See *Hill v. Ely*, 5 Serg. & Rawle, 363, and *Miller v. Henderson*, 10 Serg. & Rawle, 290. The opinion of the court is, that the plaintiff in error has sustained the errors above adverted to.

Judgment reversed, and a *venire facias de novo* awarded,

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/ ALEXANDER DEAN, surviving Assignee of BENJAMIN  
DAVIDSON, against JOHN PATTON.

The trustee of an insolvent debtor, having in his own name, sued a mortgage given to the insolvent, obtained a judgment, and issued a *Lev. Fas.* thereupon; by virtue of which, the sheriff sold the mortgaged premises, and received the purchase money. *Held:* that in a suit brought against the sheriff, to recover the money from him, he cannot set up as a defence, that the trustee had never given bond as required by the act of Assembly.

WRIT of error to the special Court of Common Pleas of Huntingdon county.

The only question of law which was argued in this court, grew out of the following facts.

*Alexander Dean* was the surviving assignee of *Benjamin Davidson*, an insolvent debtor, and as such, in his own name, issued a *scire facias* on a mortgage, given by *James Clark* to the said *Benjamin Davidson*, obtained a judgment thereupon, and issued a *Lev. Fas.* directed to *John Patton*, the defendant, then sheriff of Huntingdon county, upon which he sold the mortgaged premises for two thousand four hundred and seventy dollars, and received the purchase money. This action for money had and received for the plaintiff's use, was then brought against him to compel him to pay it over; to which he set up a defence, that the plaintiff had not given bond with security, as trustees of insolvent debtors are required by the act of assembly to give, before suit brought.

The court charged the jury on the other points in the cause, and reserved the point above mentioned.

(Alexander Dean, surviving assignee of Benjamin Davidson, v. John Patton.)

The jury found a verdict for the plaintiff: but the court being of opinion that the objection to the plaintiff's recovery was fatal, entered judgment for the defendant.

*Miles*, for plaintiff in error.

The right of the plaintiff to have the money, had been established by the judgment on the mortgage; it had passed in *rem judicata*; and a sheriff could not collaterally controvert that right. *Dawson v. Ewing*, 16 Serg. & Rawle, 371.

The plaintiff in this suit sues in his own individual right, and the plea of *non assumpsit* admits the character in which he sues. *McKim v. Riddle*, 2 Dall. 100.

*Potter and Blanchard*, for defendants in error.

The plaintiff claims the money as trustee of *Davidson*, and he must show that he has qualified himself under the act of 4th April 1798, before he can sustain a suit. Upon his neglect or refusal to give bond, the court may appoint another trustee. *Willis v. Low*, 3 Yeates, 520. *Henderson v. Cooper*, 6 Bin. 189. Under the plea of *non assumpsit* the defendant may avail himself of the defence that no bond has been given. *Kennedy v. Ferris*, 5 Serg. & Rawle, 397. *Park v. Graham*, 4 Serg. & Rawle, 549.

*Hale*, in reply.—If the court should be of opinion that the judgment should be reversed, they will enter judgment for the plaintiff below upon the verdict.

PER CURIAM.—The sheriff is an officer of the law, but for the benefit of those who are entitled to his services; and to suffer him, instead of serving the plaintiff in an execution, to baffle him by disaffirming his right to the money, although solemnly adjudged in an action between the proper parties, would be vexatious and oppressive. No sheriff ever thought of alleging as a pretext for retaining money in his hands, that the plaintiff had recovered under void letters of administration. His plain duty is obedience to the mandate of the writ, by having the money ready for the plaintiff before the court. On the other hand, although the sheriff will not be allowed to dispute the plaintiff's title, the court will take care that the creditors of the insolvent be properly secured before the plaintiff has leave to take the money out of court; and thus substantial justice will be done without unnecessary delay.

Judgment of the court below reversed, and judgment upon the verdict for the plaintiff.

[ ROBERT SMILEY *against* ROBERT DIXON, BENJAMIN CARSON and JAMES CARSON.

A. being the owner of a tract of unimproved land, sells one hundred acres to B. and one hundred acres to C. ; B. and C. go upon the ground and mark a division line between them; it was afterwards discovered that A. had no title to the land: B. then went upon it, had a survey made of four hundred acres, including the one hundred acres sold to C. and acquired title by actual settlement : *Held*, That there was not such a privity of estate or title between B. and C. as to prevent B. from thus acquiring for himself, a title to the whole of the land.

WRIT of error to the Common Pleas of Clearfield county.

This was an action of ejectment brought by *Robert Carson*, the plaintiff in error, and plaintiff below, against *Robert Dixon*, *Benjamin Carson* and *James Carson*,

The case was this: *Robert Maxwell* was the agent of *John Mitchell*, with authority to sell certain lands in Clearfield county, and being indebted to *Robert Smiley*, the plaintiff, he agreed to sell to him one hundred acres of the land, in consideration of the debt. About the same time *Maxwell* also agreed to sell the other hundred acres of the same tract to *Benjamin* and *James Carson*, the defendants, at one dollar and fifty cents per acre, out of which was to be deducted a debt due to them also. *Maxwell* afterwards went upon the ground with *Smiley* and the *Carsons* and marked the division line between them. The agreement between them was that *Mitchell* was to make the titles. Soon after this *Smiley* and the *Carsons* discovered that neither *Maxwell* nor *Mitchell* had any title to the land. At this time no possession had been taken of the land by either party. *Smiley* then said that he would go on the land, improve it, and acquire title by improvement, and hold four hundred acres. He did move on it, built a house, cleared land, raised grain, and made a survey to include the land in question; and which is the part which *Maxwell* sold to *Benjamin* and *James Carson*. About two years afterwards *Benjamin* and *James Carson* went upon their hundred acres, put a small house on it, and put *Dixon*, one of the defendants into it, as their tenant. It was also in proof, that before the *Carsons* went on the land, one *Dunlop* had settled upon their hundred acres, and commenced an improvement, and in conversation between *Dunlop* and *Carson*, he told *Dunlop* that he had better not make an improvement, for *Smiley* would take it from him.

The court below was of opinion, and so instructed the jury, that the plaintiff ought not to recover; on the ground, that each had purchased the one half of the same tract of land, each had expended his money, and each had a right to perfect his own title to his respective lot; and that it would be against equity and justice, to permit either to take advantage of the other, inasmuch as they had

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purchased from the same source, with a perfect knowledge of each other's rights, and had been equally unfortunate.

The jury found for the defendants, and the plaintiff sued out this writ of error.

*Blanchard*, for the plaintiff in error.

The law as laid down by the court is only applicable to a case where there is a privity of estate or interest or community of title, and such is the case of *Vanhorn v. Fonda*, 5 Johns. Chan. 407, upon which the opinion of the court below in this case was predicated. In this case there was no privity of estate or community of title. The doctrine, when it does apply, is founded upon a trust, which did not exist between *Smiley* and *Carson*, for their titles were separate and distinct. Cited *Walker v. Walker*, 16 Serg. & Rawle, 384. *Dorsey v. Jackman*, 1 Serg. & Rawle, 51.

*Valentine*, for defendants in error.

The conduct of *Smiley* in procuring his title to the prejudice of *Carson*, taken in connection with the relation which existed between them, was a fraud which equity will not sanction. The parties lived together, consulted about their title, talked about their division line, and with a full knowledge of each other's want of title, *Smiley* sneaks off and commences an improvement not only to perfect his own title, but also take from *Carson* his title. The parties had a community of title; for each purchased the same title from the same person. This is an action in which the plaintiff seeks to have the equitable powers of the court administered in his behalf, which his conduct does not merit. He cited 4 Vin. Ab. 388. 1 Fond. Eq. 125. *Dunning v. Carothers*, 4 Yeates, 17, *McPherson v. Cunliff*, 11 Serg. & Rawle, 427.

The opinion of the court was delivered by

HUSTON, J.—(His honor here stated the case.) The Court of Common Pleas instructed the jury, that as both plaintiff and defendants had purchased from one who had nothing to sell—mere moonshine, and were equally unfortunate, that it was against equity for the plaintiff to claim, and take into his survey, what he knew another had bought, and what was separated by a line which he knew, and which he saw run and marked. That as they both purchased from the same person, the one could not hold the land which was to have been given to the other: and the court relied on the case of *Vanhorn v. Fonda*, 5 Johns. Chan. 388, and *Ligget v. Bechtol*, in this court. If *Maxwell* had title, this would have been right; for neither could obtain fairly from him, what he knew was by agreement to be conveyed to another. But it is admitted that *Maxwell* had not even colour of title; his sale then, and purchase from him is literally nothing, even if there had been proof that his agreement with *Carson* had assumed any definite shape. Chancellor *Kent* decided, that one of two devisees could

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not purchase an incumbrance on their joint estate, and use it to sell the land and strip the other of his property: and in *Ligget v. Bechtol*, this court decided, that two tenants in common, who had heard of an adverse title, and agreed to join in defending against it, or in purchasing, were bound to deal fairly with each other: and that one of them who purchased the adverse title for a small sum, must hold it in trust for the other, upon that other paying his proportion of the purchase money: and the law is clearly as decided in each of those cases, nay, it goes farther; and wherever two have a joint estate, it raises a duty in each to deal fairly with the other; and one who purchases an adverse title, will not be allowed to sweep all from his co-tenant; unless some special circumstances occur in the case. In this case, these men did not purchase jointly, neither had any thing by purchase from *Maxwell*; they were not joint tenants, or tenants in common; and there was no privity between them. The bare fact that each had been cheated, neither gave any right to the other, or deprived him of the full and absolute right to purchase from the real owner, when discovered. The State was the owner; and *Smiley* purchased from the State by his actual settlement.

When a man sells a defective title, and afterwards purchases the real title, this shall be in trust for his vendee, from whom he shall not take away the land which he himself sold. And when one, present at a treaty of sale, advises a person to purchase and that the title is good, he shall not afterwards purchase a good title, and recover the land from one whom he induced to buy and pay his money. *Lane v. Reynard*, 2 *Serg. & Rawle*, 65. This does not come within any of those cases; nor, as is believed, within any decided case; nor is it governed by any principle recognized in any court. There was no privity, no confidence between the parties, no concealment by *Smiley*, and nothing done by him to induce *Carson* to purchase, or to confide in their purchase. The land was vacant to be taken by the first occupant; and there existed no obligation of law or tie of conscience, to prevent *Smiley* from taking possession.

It was however said, that *Smiley*, who was unmarried, boarded at *Carson's* during the inception of his improvement, and until his house was fit to reside in. Of itself this would give no right to *Carson*. The proof is that before and during the time of improving, *Smiley* said he would hold four hundred acres by his improvement; and there is another fact which shows that *Carson* knew this, and acquiesced in it, that is, that he told *Dunlop*, who began to improve on the land now in dispute, after *Smiley*, that *Smiley* could hold the land by improvement, and *Dunlop* moved off. This was a material fact, and showed that *Carson* knew his own purchase to be worthless; that he did not claim under it; that he knew how *Smiley* claimed; knew of the extent of his claim, and admitted its validity. Taking this with the other facts in the cause, we are at

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a loss to discover any principle of law or equity, which has been violated by *Smiley*, or on which the *Carsons* can rely as a defence. It is not enough to destroy a right, that some men would have scrupled to have acquired it, until they had inquired of another whether he wished to purchase it. For some time after the imposition by *Maxwell* was discovered, the land was open to occupation by the *Carsons*, as well as by *Smiley*; they do not enter, they know *Smiley* is acquiring title; they state to a third person that his title is good. Years afterwards, when the general improvement of the country is adding value to lands, they enter under pretence of what is conceded to be no title. This conduct savours more of unfairness than that of *Smiley*.

Judgment reversed, and a *venire facias de novo* awarded.

### GEORGE B. ENGLE against JOHN NELSON.

A special plea that a domestic attachment, grounded upon the same cause of action, had issued in another county, and is yet pending, is a plea in abatement, and cannot be put in after issue joined upon a plea in bar.

The rule is different as regards a popular action: there the pendency of a prior action extinguishes the title of every one else, and necessarily bars the right.

WRIT of error to the Common Pleas of Centre county.

This was an action of *assumpsit* brought by *John Nelson*, the defendant in error, against *George B. Engle*. Issues were joined upon the pleas of *non assumpsit* and *payment*: after which the defendant filed the following plea:

"And the said *George B. Engle*, by *T. Burnside* his attorney, comes and defends the wrong and injury when, &c. and says, that he ought not to be charged with the said debt, because the said *John Nelson*, on the 9th of February, 1819, issued out of the court of Common Pleas of Huntingdon county, against the said *George B. Engle*, a writ, commonly called a domestic attachment, for the same cause of action, for which this suit is brought; and that the sheriff of Huntingdon county, in pursuance of the said writ of domestic attachment, attached of the property of the said *George B. Engle*, ten dollars, in the hands of *John Wall*, eighty dollars in the hands of *Thomas Taylor*, and accounts, judgments and money in the hands of *John Morrison*, Esq. and *Enoch Hastings*, Esq. of the said county of Huntingdon: and the said court did, on the 18th April, 1819, on motion, appoint *John Crawford*, Esq. *David M. Murtrie* and *Jacob Neff*, auditors, to settle and adjust the claims of the several creditors of the said *George B. Engle*. And that the said

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suit is still pending, and not finally determined; and this he, the said *George B. Engle*, is ready to verify. Wherefore he prays judgment, if the said *John Nelson* ought to have or maintain his aforesaid action thereof against him, &c."

To this plea the plaintiff refused to reply, as being in every way incompetent and informal; and the court would not require them to do so, but considered it a nullity. To this opinion the defendant excepted; and here assigned it as error.

*Petrikín*, for plaintiff in error.

A foreign attachment pending, cannot be given in evidence under the general issue; but must be pleaded specially. *Updegraff v. Spring*, 11 *Serg. & Rawle*, 188.

Pendency of a former action for the same cause, may be pleaded either in bar or abatement. 1 *Bac. Ab. 24*, title *Abatement*.

*Potter*, contra.—If the plea was any thing, it was in abatement, and came too late. *Riddle v. Stevens*, 2 *Serg. & Rawle*, 537. *Witmer v. Salter*, 15 *Serg. & Rawle*, 150. *Wilson v. Hamilton*, 4 *Serg. & Rawle*, 238. That it was a plea in abatement. 1 *Chit. Plead.* 443. *Embre v. Hannah*, 5 *Johns. Rep.* 101. *Commonwealth v. Churchill*, 5 *Mass.* 174.

When matter is pleaded specially which may be given in evidence under pleas already entered, it need not be answered. *Pedan v. Reed*, 8 *Serg. & Rawle*, 263. *Shaw v. Redmond*, 11 *Serg. & Rawle*, 27–8. *Riddle et als, v. Stevens*, 2 *Serg. & Rawle*, 544. *Barrington v. Washington Bank*, 14 *Serg. & Rawle*, 405.

PER CURIAM.—That the pendency of the domestic attachment in Huntingdon county, was clothed in the drapery of a special plea in bar, can impose on the plaintiff no additional obligation to answer it, if it were essentially pleadable only in abatement; and it is necessarily so, where it goes, not to the plaintiff's title, but to the particular action. It is different however as regards a popular action, which vests the property of the thing in action, in the party who has first sued for it: there the pendency of a prior action which extinguishes the title of every one else, necessarily bars the right, and this distinction is not only founded in technical reason, but recognized by the best elementary writers. 1 *Chitty on Plead.* 443. As a plea in abatement, then, this branch of the defence was not only grossly defective in form, but produced at a stage of the pleadings when it was decisively inadmissible; and the court was perfectly accurate in treating it as a nullity.

Judgment affirmed.



**JAMES IRWIN**, surviving administrator of **JAMES IRWIN**, deceased, *against* **DAVID ALLEN** and **MARY FETTERMAN**, who survived **JAMES SANDERSON** and others.

A power of attorney, executed by an administrator, who does not therein style himself as such, by virtue of which a dispute is settled between his intestate and a third person, by the attorney-in-fact, is competent evidence to go to the jury, with the settlement and release, particularly if it did not appear that the administrator had any account in his own right to settle.

An attorney-in-fact is a competent witness to prove, that a settlement made with him for his principal, upon which he executed a release to the party, was obtained by a misrepresentation of the truth.

**ERROR** to the Common Pleas of Mifflin county. The plaintiffs in error were the plaintiffs below.

*David Allen, Mary Fetterman* and another, were the administrators of *George Irwin*, deceased, who, together with their sureties in their administration bond, were sued in the name of the commonwealth, and a judgment was rendered against them for the amount of the penalty. After which a suit was brought by the present plaintiff against *David Allen* and *Mary Fetterman*, surviving administrators of *George Irwin*, deceased, in which he recovered a judgment for one thousand six hundred and sixty-seven dollars and fifty-two cents. Having thus liquidated the claim due to the estate of *James Irwin*, deceased, his surviving administrator, *James Irwin*, issued a *scire facias* upon the judgment in the name of the commonwealth to recover the amount due to the said estate by the defendants; which is this cause.

Issues were joined upon the pleas of *nul tiel record, payment, a release, and accord and satisfaction*.

The plaintiff having given in evidence the record of the judgment, for the penalty of the administration bond, and the judgment in the suit brought against the defendants as executors of *George Irwin*, deceased, rested.

The defendants offered in evidence a power of attorney, *James Irwin* to *Clendenin Ross*, and from *Clendenin Ross* to *William Irwin*; and an agreement entered into between *William Irwin* and *David Allen*, by which the claim of *James Irwin*, administrator of *James Irwin*, deceased, against *David Allen* and *Mary Fetterman*, administrators of *George Fetterman*, deceased, was adjusted and settled by the payment of three hundred dollars to the said *William Irwin*.

This evidence was objected to by the plaintiff, on the ground that in the power of attorney, *James Irwin* did not call himself the administrator of *James Irwin*, deceased, nor execute it as such; and that the agreement was not executed by *William Irwin* as the attorney-in-fact of *James Irwin* or *Clendenin Ross*, but in his own

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name. These objections having been overruled, an exception was taken by the plaintiff.

The plaintiff then offered *William Irwin* as a witness, to prove, "that *David Allen* came to him and stated that there was no part of the estate of *George Irwin*, deceased, in his hands; that the whole estate had been disposed of in the payment of the debts of the intestate; that he would pay him three hundred dollars if he would give him a release; that lawyer *Anderson* had made a calculation by which it appeared there was not fifty dollars in his hands. That the witness was induced by these representations to sign the release. And to follow up this by proof, that at that time the administrators of *George Irwin* had in their hands, estate to, a large amount, at least three thousand dollars, and that the proportion then justly due to the plaintiff's intestate exceeded one thousand dollars."

This evidence the defendants objected to: 1st. *William Irwin* is not a competent witness to prove the facts. 2d. It is not an offer to prove that *David Allen* had the money in his hands, but that it was in the hands of the administrators. 3d. The whole offer is to prove misstatements of *Allen*, and to set aside the solemn act of the witness himself, when the office was open to him, and he had a full opportunity of informing himself about the estate; and, 4th. The whole offer, if believed to be true, is not such evidence of fraud as to go to the jury.

The court sustained the objections, and overruled the offer, to which the plaintiff excepted.

Error was here assigned in the opinion of the court as contained in these two bills of exception.

*Potter*, for the plaintiff in error.

The power of attorney, and agreement made in pursuance thereof, should not have been received in evidence to defeat a claim made by *James Irwin* in his representative capacity; for it was not executed by him in that capacity. There is no rule of law which will exclude *William Irwin*, as a witness, although he executed the agreement in his own name, yet he did it as the agent of *James Irwin*, for he had no interest of his own to settle. His evidence did not tend to destroy his own solemn act, but to show the circumstances under which it was executed. But even if it did, it would not render the testimony illegal. It was a matter of no consequence whether it was *Allen* who had the estate in his hands, or his co-administratrix, for they were jointly and severally liable for it.

*Blanchard*, for defendant in error.

The plaintiff having derived advantage from the power of attorney, by procuring a settlement of his intestate's claim under it, as though it had been in all respects formal, now objects to it, because

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he is not called administrator. It does not appear that he had any claim on the defendants in his own right; but, on the contrary, it is manifest that the authority delegated was to settle the claim due to the estate of his intestate.

If all the facts offered and contained in the second bill of exceptions were strictly true, they would not amount to a fraud, such as would avoid the agreement and release. The estate may have been in the hands of *Mary Fetterman*, and in jeopardy, and if so, it would be perfectly fair for *David Allen*, although liable, to buy himself out of the liability.

The opinion of the court was delivered by

ROGERS, J.—There is nothing in the first objection. Although the letter of attorney is given by *James Irwin*, without stating himself to be administrator of *James Irwin*, deceased, yet, it is plain it is a letter of attorney in the suit in which the compromise was made, and was given by the administrator as such, and with a view to a settlement of that suit. It would be unjust that the estate should reap the fruits of the compromise, and afterwards avoid the agreement, because the administrator had omitted to describe himself, in his representative capacity. If it had been shown that *Irwin* had any accounts against the estate of *George Irwin*, in his own right, and that he had disclaimed the act of the attorney, there might have been some colour for the objection. But in the absence of all proof to the contrary, *ut res magis valeat quam periat* we must refer the transaction to the character in which he alone had any demands against the defendants.

After the admission of the agreement, the plaintiff offered to prove, that *David Allen* came to him, and stated that there was no part of the estate of *George Irwin* in his hands, that the whole estate had been disposed of in payment of the debts of the intestate, and that he would pay him three hundred dollars, if he would give him a release; that *Allen* stated, that lawyer *Anderson* had made a calculation, by which, he said it appeared there was not fifty dollars in his hands. This to be followed up by proof, that at the time, the administrator of *George Irwin* had then of the estate in their hands at least three thousand dollars, and that the proportion then justly due to plaintiffs exceeded one thousand dollars.

We are to take it, that the plaintiffs could prove their offer, and if so, we have the case of a person defrauded out of upwards of seven hundred dollars, by the false and fraudulent representation of his own trustee. This cannot be allowed; for the law exacts the utmost good faith from one acting as a trustee. It has been repeatedly decided that the guardian or executor shall not be permitted to speculate at the expense of the ward or personal representatives. Nor can I perceive in what respect the creditors are placed

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in a worse situation, as the administrator is as much the trustee of the creditors as the personal representative. It matters not that the administrator derives no benefit from the compromise. The creditors have a right to complain that their interests have been sacrificed, by a person whose duty it was to protect them, and whether this be done for the benefit of himself or others, is totally immaterial to him. It may lessen the moral turpitude of the transaction, that the administrator derives no benefit from the agreement; yet the loss remains the same to the creditor, whoever may profit by his false and fraudulent representations. When we consider that the administrator is usually one of the heirs, or a relative or friend of theirs, there is great reason that the court should be vigilant to protect the rights of creditors. As the administrator has the full knowledge of the estate, it is a violation of his duty, to be guilty of any concealment in respect to it. Such a course of conduct is fraudulent and void.

As the facts offered were evidence, there is no doubt the attorney-in-fact was a competent witness to prove them: he has no interest whatever in the event of the suit.

Judgment reversed, and a *venire facias de novo* awarded.

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### ADAMS' Appeal.

A mortgage unrecorded in the life time of the mortgagor, has no preference over other specialty debts, out of the proceeds of the sale by the sheriff of the mortgaged premises, after the decease of the mortgagor.

THIS was an appeal by *John Adams* from the decree of the Court of Common Pleas of Huntingdon county, distributing the proceeds of the sale, by the sheriff, of the real estate of *James Adams*, deceased.

*James Adams*, in his life time, being the owner of a tract of land, executed a mortgage upon it to *John Adams*, to secure the payment of a certain debt: he also became indebted to several other persons by specialties, and died. After his death the mortgage was put upon record, sued and judgment obtained thereon. The same land was then sold on an execution by the sheriff, and the money brought into court for appropriation: and the question presented to the court was, whether the unrecorded mortgage was entitled to a preference over the other debts of *James Adams*, deceased, which were secured by specialties.

The court below made a decree, distributing the proceeds of the sale *pro rata* among all the specialty creditors of the de-

(Adams' Appeal.)

ceased, including the mortgagee; from which decision *John Adams* appealed.

*Bell*, for appellant.

An unrecorded mortgage is good against the mortgagor, the recording act being only intended to protect subsequent judgment creditors and purchasers. A creditor of the mortgagor, unless he be a lien creditor, cannot take advantage of the want of recording of the mortgage, which the mortgagor himself could not take. *Levinz v. Will*, 1 Dall. 430. The mortgagee might have sustained an ejectment, and recovered the land itself. *Smith v. Shaler*, 12 Serg. & Rawle, 240. Having thus an equitable specific lien on the land, he is entitled to a preference over the specialty creditors.

*Potter*, for defendant in error, whom the court declined to hear,

The opinion of the court was delivered by

SMITH, J.—The moment a man dies, leaving debts, every one of his creditors has a lien on his estate. Such debts have their various grades, fixed by the death of the debtor, and all specialty debts come in, and are to be paid equally. The law requires a mortgage to be recorded in six months, and no estate will pass by it, unless recorded within that period. It is true the act of assembly was made for the protection of mortgagees; but like others, they may lose their lien and their protection by neglect. "Liens," said the present chief justice, in delivering the opinion of this court, in *Kauffelt v. Bower*, 7 Serg. & Rawle, 64, "are permitted; but those who have them, are laid under severe limitations and restrictions. Thus, by act of assembly a judgment continues a lien for but five years, unless within that period, it be revived by *scire facias*; and by the acts of 1715, and 1775, no mortgage could affect the land, unless it were recorded within six months from the date. This has, however, been altered in some respects by an act of the last session." The owner of this mortgage having neglected the requisition of the law in regard to the recording of it, it is only to be considered as a specialty. In fact, to give to it now, the validity of a regular mortgage, would repeal the acts of the 28th of May, 1815, and of the 28th of March, 1820, and the 14th section of the act of 1794, and the tendency of the decision would be to defeat all the valuable purposes of those enactments. Nothing favourable to the claim of the executors of *John Adams*, can be drawn from any of the decisions made in England, or other countries, where the laws do not require mortgages to be recorded, for our recording acts, by their very terms, have put those decisions all out of the question.

Decree affirmed.

## M'KEE'S Case.

The Circuit Court has no appellate jurisdiction of proceedings in the Quarter Sessions, when not according to the course of the common law: hence it has not jurisdiction of a proceeding against a husband for deserting his wife and children.

The Circuit Court may remove a cause by *habeas corpus*, with a view to the trial of an issue, but it can only do so when the issue is according to the course of the common law.

*John M'Kee* having deserted his wife and children, she made an application to a justice of the peace for relief, who issued a warrant against *John M'Kee*, commanding the constable to take him, and bring him before him, that he might be bound over to appear at the next Court of Quarter Sessions, to answer the complaint of his wife. He was taken, and gave security for his appearance at the next sessions, when his attorney made the necessary certificate, and removed the case into the Circuit Court. It came on to be tried in the Circuit Court, and his honor justice *Rogers* dismissed the cause and complaint, on the ground that the Circuit Court had no jurisdiction of it. From this decision, *John M'Kee* appealed to the Supreme Court.

*Petrikín and Potter*, for appellant.

The acts of the 9th March, 1771, section 30, and 31st March, 1812, section 6, *Purd. Dig.* 659–679, authorise a proceeding by overseers of the poor, in cases where the wife is chargeable, or likely to become so. This is in the nature of a civil proceeding by the wife, and if she is entitled by any law to recover money, the husband would be entitled to a trial by jury: and if so, the Circuit Court would have jurisdiction. Whenever an issue is to be tried, that court has jurisdiction. *Woods v. Woods*, 17 *Serg. & Rawle*, 12. *Light v. Light*, *ib.* 273. *Robbarts v. Robbarts*, 9 *Serg. & Rawle*, 191. *Whart. Dig.* 463. No. 175.

*Valentine and Blanchard*, for appellee, whom the court declined to hear.

PER CURIAM.—The Circuit Court is a substitute for the former court of Nisi Prius, with scarce any power beyond the trial of issues, but to render judgment and determine appeals from the Register's and Orphans' Courts. There was no necessity, and consequently no design to give it the general powers and jurisdiction of the Supreme Court in bank. It clearly has no appellate jurisdiction of proceedings in the Quarter Sessions, when not according to the course of the common law; especially of a proceeding like the present, which strongly savours of a civil remedy, and which is particularly committed to that court. Even the Supreme Court in bank could take cognizance of it only for the purpose of quash-

(M'Kee's Case.)

ing it, by a *certiorari* after judgment, which the Circuit Court is expressly restrained from granting; and although it may remove a cause by *habeas corpus*, with a view to the trial of an issue, it can do so, only when the issue is according to the course of the common law: beside it is enabled by the terms of the act of 1799, from which it derives its powers, to take cognizance of nothing from the Quarter Sessions but indictments. The present is not a proceeding for alimony, or one in which the intervention of a jury can be had in any shape; and we are satisfied that the judge at the Circuit pursued the proper course in remanding it to the Sessions. Order of the Circuit Court affirmed.

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JOHN SENSER and others *against* ANDREW BOWER and wife.

1 PW 450  
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1 PW 450  
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For civil purposes, reputation and cohabitation are sufficient evidence of marriage.

In all cases of conflicting presumptions on the subject of legitimacy, that in favour of innocence shall prevail.

The alienation of an improvement right by the widow, after the death of her husband, leaving an infant two years of age, will not bar the right of such infant to recover the land, when it arrives at full age, even if the consideration received by the widow should have been applied to the support and maintenance of the child.

Query? Whether there can be an abandonment of a right by an infant.

ERROR to the special court of Centre county, (Reed, president.)

This was an action of ejectment for one hundred and fifty acres of land brought by *Andrew Bower* and *Susanna* his wife, against *John Senser* and others.

The evidence upon which the plaintiff's title was founded, was, that about 1796, *Daniel Zinn* left the house of a neighbour, with *Catherine Kitelinger*, for the purpose of being married, they soon returned, and it was understood that they were then man and wife; that they lived and cohabited together as such, and had issue one daughter, the present plaintiff. That about 1798, they moved to the land in dispute, cleared two or three acres and fenced it, built a cabin and stable, and resided there about three years, when *Daniel Zinn* died.

The evidence given for the defendants, as they contended, established two grounds of defence. First, they proved that many years before the alleged marriage of *Catherine Kitelinger* with *Daniel Zinn*, she and *Jacob Kitelinger* left the house of a neighbour, to go and be married, that they returned soon after as man and wife, lived and cohabited together as such, for several years, and had issue two sons; that *Jacob Kitelinger* went to the western country,

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and had been absent about seven years, when his wife married *Daniel Zinn*; there had been a report that he was dead, but about a year after *Daniel Zinn* died he returned and took up with his wife again. Upon this evidence, the defendants contended that the second marriage of *Catherine Kütelinger* was illegal and void, and the issue of it illegitimate; and therefore the plaintiffs could not recover.

The second ground of defence was—that upon the death of *Daniel Zinn*, leaving his widow and infant daughter, the present plaintiff, the actual settlement was not complete, and at all events insufficient to support the widow and child, and therefore the widow sold what right they had to one *Hinton*, under whom the defendants claim, and have been in possession for twenty-three years before suit brought, having, during that time, made valuable improvements. It was also in proof that *Susanna*, the plaintiff, was raised and supported by her mother.

Many points of law, growing out of these facts were put to the court by the counsel on one side and the other, upon which they were requested to instruct the jury, all of which were resolved into two questions. First. Whether, under the evidence, *Susanna Bower* was the legitimate daughter of *Daniel Zinn*, upon whom the law would cast an inheritance, and—Second. Whether the right which *Daniel Zinn* had, by virtue of the acts done upon the land, was such an inheritance as the law would cast upon the heir; or whether it was not such an imperfect right that might pass as a chattel.

The court below was of opinion, that in every aspect of the case, the plaintiffs were entitled to recover; and so instructed the jury. To which opinion the defendants took an exception.

*Potter* and *Blanchard*, for plaintiffs in error.

The proof of each marriage of *Catherine Kütelinger* was the same, and the first marriage being first established, no other marriage could be established by the same kind of proof: the same witness who proved the marriage of the plaintiff's father and mother, also proved that the mother was then the wife of *Jacob Kütelinger*, who was in full life. The first marriage being thus proved by legal evidence, there can be no presumption of a second marriage, because it is a presumption of crime. The children of the first marriage are certainly legitimate, and that of the second is as certainly not so.

The inceptive right to the land in dispute was sold for a valuable consideration, by the mother, when the plaintiff was two years old, and incapable of maintaining that right; and that consideration applied to her benefit and support: can she now, after the lapse of twenty-three years, recover this land from the defendants who have made it valuable by improvements, and who never had notice of any claim of the plaintiff. The plaintiff is now claiming



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in an equitable action, and surely she is met by a superior equity in the defendants. 1 *Yeates*, 523.

An infant cannot maintain that kind of occupancy which is necessary to give or complete a right under the act of assembly. *Mobely v. Oaker*, 3 *Yeates*, 200. *Clarke v. Heckethorn*, *id.* 269. 11 *Serg. & Rawle*, 341. The effect of the infant receiving the benefit of the sale by the mother, 2 *Disseure*, 232. 3 *Disseure*, 20-24. 4 *Disseure*, 445. As to the legitimacy of the plaintiff, 3 *Black. Com.* 92. *Davis v. Houston*, 2 *Yeates*, 289. As to the lapse of time before suit brought. *Jackson v. Thomas*, 16 *Johns.* 293. *Jackson v. Wheat.* 18 *Johns.* 40. 5 *Day*, 181. *Jackson, ex dem, v. Ellis*, 13 *Johns.* 118-40-513. As to the defendants' want of notice. *Day v. Dunham*, 2 *Johns. Chan.* 182. *Billington v. Welsh*, 5 *Bin.* 129. *Jackson v. Henry*, 10 *Johns.* 185. *Hibernia Turnpike Co. v. Henderson*, 8 *Serg. & Rawle*, 219.

*Petrikín and Valentine*, for defendants in error, whom the court declined to hear.

The opinion of the court was delivered by

GIBSON, C. J.—For civil purposes, reputation and cohabitation are sufficient evidence of marriage; and there is evidently enough in the case to show that the plaintiff's father and mother were married in fact. But there is said to be the same evidence of a precedent marriage of the mother with another man, who was alive at her second marriage; and hence a supposed dilemma. But the proof being equal, the presumption is in favour of innocence; and so far is this carried in the case of conflicting presumptions, that the one in favour of innocence shall prevail. *Starkie on Ev. pt. IV.* 1248-9. It must be admitted that this principle is not immediately applicable here, inasmuch as there is no conflicting evidence, and the facts supposed to result, are consistent with each other; but it establishes that the same proof that is sufficient to raise a presumption of innocence, may be inadequate to a presumption of guilt. To say the least, then, the jury were not bound to draw the same conclusion of marriage from the same evidence, without regard to consequences; and to have instructed them that they were, would have been error. On the contrary, they were bound to make every intendment in favour of the plaintiff's legitimacy, which was not necessarily excluded by the proof. But was the evidence in fact, exactly balanced? The presumption of marriage from cohabitation may be rebutted by evidence of separation, without an apparent rupture. *Jackson v. Claw*, 18 *Johns.* 346. And here there was a separation, without an apparent cause, for eleven years, which independent of any rule of presumption, would be sufficient to give the evidence of legitimacy a decisive preponderance.

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The facts connected with the remaining point are, that the plaintiff's father made an actual settlement on the land in 1798, by building two cabins on it in succession, clearing and cultivating a portion of it, designating his boundaries, and residing on it till his death in 1800; after which, his widow sold the improvement to a person under whom the defendants claim. The lessee of *Mobely v. Oaker*, 3 Yeates, 200, and the lessee of *Clark v. Heckethorn*, id. 269, are inapplicable to the case of an improvement so recent as the present. At an early day this species of title was of so little account, that it was sold as a chattel in a course of administration. 2 Yeates, 378; but in 1800, it had gradually acquired the consistence of an indefeasible estate; and although it might still be lost by abandonment, the evidence of an intention to produce that effect, was required to be clear and satisfactory. Here there is no pretence of abandonment, as both parties claim by the improvement begun by Zinn, the title to which was clearly in his daughter when it was sold by her mother; so that the fifth section of the limitation act of 1785, (which has been held to operate only on equitable titles then existing,) being out of the way, the question simply is, whether she is barred by her mother's alienation; and it is clear that, unless there is something peculiar in the case, she is not. No equity arises from the supposed application of the price to her maintenance. A sale for that object could be ordered only by the Orphans' Court, with which the law has deposited the requisite discretion. Neither could a supposed necessity to interpose for the preservation of the inheritance from a total loss, by abandonment of the improvement, give an additional sanction to the act of the mother. I will not undertake to say that there may not, even at this day, be an abandonment by an infant. Whether any thing but an intentional relinquishment of the title, of which the circumstances are but evidence, can be effectual, and whether an infant be not incapable of such relinquishment, by reason of want of discretion, are points that may hereafter be worthy of consideration. But, whatever be the motive, it is clear that a parent has no power to divest the infant's estate; and we discover nothing in the case to induce us to disturb the judgment.

Judgment affirmed.

JOHN ADDLEMAN *against* ANTHONY MASTERSON.

It is a fatal objection to a deposition, taken to be read in evidence in a cause, that it is in the hand writing of an attorney concerned in the cause, or specially employed by the party for that purpose, unless the opposite party, or his attorney, be present and consent thereto.

An application and survey may be abandoned, but whether or not, depends on the facts to be found by the jury. The payment of fees of office, of surveying fees, and returning the survey, are facts tending to repel the presumption of abandonment.

An application obtained in 1766, and the land circumscribed by a survey, marked on the ground, but the owner of the survey neglects to have it returned, and refuses to pay the surveying fees, and it continued in this way, until 1785, when a warrant issued for the same land to another. *Held:* That the title of the warrantee shall be preferred.

ERROR to the special Court of Common Pleas of Huntingdon county, (*Reed*, president.)

In the court below this was an action of ejectment brought by *Anthony Masterson* against *John Addleman*.

The plaintiff gave as evidence of his title—18th May, 1784, warrant to *Walter Hood*, “for three hundred acres, on a creek running into the Warrior-mark run, in or about a mile from the mouth of said branch, and about two miles from the Warrior-mark, in the county of Bedford.”—10th January, 1785, certificate of the payment of the purchase money, thirty pounds.—25th August, 1785, deed, *Walter Hood* and wife to *Phineas Massey*.—29th March, 1787, certificate of the return of survey.—2d October, 1795, deed, *Phineas Massey* to *Anthony Masterson*.

The defendant then gave in evidence.—22d October, 1766, application No. 1629, of *Thomas Morris*, for three hundred acres, “to join on the westerly a survey on a large run, which leads into the east branch of Little Juniata, about a mile eastward from the path that leads from Little Juniata to Susquehanna, in Cumberland county.” *William Reed*, a former deputy surveyor of the district was then called, and a draft of a survey of the land in dispute was shown to him, which he said he found in the office, when he held it in 1821; and that it had upon it the hand writing of *Richard Tea*, who had been the deputy surveyor of the district in 1767. He and all the other witnesses said that the description in the application of *Thomas Morris* was precisely descriptive of the land in dispute.—20th April, 1767, deed, *Thomas Morris* to *David Kennedy*. 4th June, 1795, order of the Board of Property, on a petition for a re-survey.—30th November, 1795, another order of the Board of Property on the subject.—21st May, 1796, return by *John Cannon*, deputy surveyor, by order of the Board of Property.—31st May, 1796, deed, *David Kennedy* to *Michael Kryder*.—18th May, 1797, patent to *Michael Kryder*.—16th October, 1797, deed, *Michael*

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*Kryder* and wife to *John Addleman*, the defendant. It was also in proof, that the defendant's survey upon the ground, corresponded with the draft given in evidence, which was found in the office of the deputy surveyor; and upon blocking the trees, they counted back to 1767, when *Richard Tea* had been the deputy surveyor of the district.

Some evidence was also given to show that *Masterson* knew of the purchase of the land in dispute by *Addleman* from *Kryder* for a valuable consideration, and did not give notice of his claim; but this was negated by the instruction of the court to the jury, and their finding.

During the course of the evidence, the defendant offered the deposition of *Col. John Cannon*; which was objected to by the plaintiff, on the ground that it was in the hand writing of *William Orbison*, Esq. the defendant's attorney.

*Mr. Orbison* sworn.—I wrote this deposition at the place designated. I have not a distinct recollection whether justice *Still* was in the room all the time or not; I remember he was in some of the time; no one appeared on part of the plaintiffs; one of the *Addlemans* was there. I was requested by Messrs. *Potter* and *Blanchard* to attend to it. I was concerned in a former suit with *Mr. Riddle* as counsel for the defendant. *Mr. Addleman* spoke to me, and said he would pay me if I would go and assist him to take this deposition. I did so, he never paid me any thing, and I do not consider myself engaged in this cause as counsel. I did appear as counsel in the cause, and my name is marked.

The court overruled the deposition, to which opinion the counsel for defendant took a bill of exception.

The counsel for plaintiff requested the court to charge the jury on the following points.

1st. That unless the jury are satisfied that the persons under whom the defendant claims, had a legal survey upon the ground in controversy, before the date of the warrant under which the plaintiff claims, the plaintiff is entitled to recover.

2d. That unless the jury have satisfactory evidence that a survey was made, by virtue of the application of *Thomas Morris*, by the proper deputy surveyor, before the date of the warrant to *Walter Hood*, the law will presume the application to have been abandoned.

3d. That even if the jury are satisfied that a survey was made by the deputy surveyor, by virtue of the application of *Thomas Morris*, previous to the date of the warrant of *Walter Hood*, yet if no money was paid on the application, but the fees of the office, and no surveying fees paid before the date of the said warrant, and the survey not returned, the jury, under the circumstances of this case, may consider the application and survey to have been abandoned.

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4th. That the deputy surveyor was not bound to return the survey until his fees were paid, and that due diligence has not been used in this case to perfect the title of the defendant, as against the title of the plaintiff.

The counsel for defendant requested the court to charge the jury on the following points:

1st. That if the jury believe, that the application of *Thomas Morris*, under which the defendant claims, is descriptive of the land in controversy, and was actually surveyed on the ground in 1767, by the then deputy surveyor, that the omission of the deputy surveyor to return the survey into the office until 1795, does not prejudice the defendant's right; and that he would be entitled to hold the land in preference to a subsequent warrant and survey in 1784.

2d. That the doctrine of abandonment does not apply to a descriptive location of 1766, actually surveyed in 1767, conveyed by deed poll in 1767, re-surveyed in 1796 on an order of the Board of Property of 1794, and patented in 1797; and can have no bearing on the present cause.

3d. That the draft found in the office of the deputy surveyor, endorsed by *Richard Tea*, the deputy surveyor, as the draft of *Thomas Morris'* survey on his location, in connection with the lines found on the ground, is *prima facie* evidence that the survey was made on *Morris'* application; and unless rebutted by other testimony, is conclusive of that fact.

The court in their answers to the several points put by the counsel on the one side and the other, left the fact to the jury, whether the delay to have the survey, upon the application under which the defendant claimed, returned for nearly twenty years, was the fault or neglect of the party; and if so, upon the whole case, the plaintiff was entitled to recover. If it was the fault or neglect of the deputy surveyor, the party would not be prejudiced thereby.

The jury found a verdict for the plaintiff.

*Blanchard and Potter*, for plaintiff in error.

Whether the location was absolutely descriptive or vague, it became certain when it was surveyed; and there could then be no presumption of abandonment, although the surveying fees were not paid. *Lowman v. Thomas*, 4 Bin. 51. *Lessee of Biddle v. Dougal*, 5 Bin. 142. The doctrine of abandonment is only applicable to those claims to land which are not founded upon contract, such as improvement rights; but a location is a contract, which there can be no presumption would be abandoned, unless there be *proof of facts* which will induce the jury to believe that such was the intention of the party. *Lilly v. Paschel*, 2 Serg. & Rawle, 395.

A deposition written by an attorney in the cause is not exceptionable on that account: the case of *Summers v. McKim*, 12 Serg. &

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*Rawle*, 406, is much stronger than this; there the deposition was not written in the presence of the justice, here it was, and by one who was not an acting attorney in the cause.

*Miles*, for defendant in error, whom the court requested to confine himself to the first point.

No money was paid upon the location but the mere fees of office, seven shillings: and the jury have found that the surveying fees were not paid, no survey returned for twenty-eight years, and this because of the negligence of the party. No act whatever in relation to the land in dispute had been done by those under whom the defendant claims, for nearly twenty years before the plaintiff's title commenced. The policy of the law will not suffer a man to select a tract of land and just do such acts respecting it, as will not make him liable to pay the commonwealth for it, but will prevent the commonwealth from disposing of it to another, who is willing to pay for it. That a claim like that of the defendant may be abandoned is fully settled. *Gilday v. Watson*, 11 *Serg. & Rawle*, 340. *Boyles v. Kelly*, 10 *Serg. & Rawle*, 217. *Chambers v. Mifflin*, ante, 78.

The opinion of the court was delivered by

ROGERS, J.—The rejection of the deposition of *John Cannon*, comes within the principle of *Summers v. McKim*, 12 *Serg. & Rawle* 410. It is immaterial whether *Orbison* was concerned in the conduct of the suit or not, as it appears he was specially employed to take the deposition of the witness. There is as much danger from testimony taken under such circumstances, as when the attorney is retained generally for the trial of the cause. Nor would it have altered the case, if *Orbison* had been specially authorised to write the deposition. It is not competent for the justice to make the attorney of one of the parties his clerk, to take a deposition, unless with the express consent of the other party, or in the presence of his attorney, and acquiesced in by him. We concur in the sentiments of the chief justice, in *Summers v. McKim*, and feel no disposition to relax the rule established in that case.

The remaining exceptions apply to the charge. It is said the court were in error, in instructing the jury that they might presume an abandonment of the defendant's right, under the application of *Thomas Morris*.

It was in evidence, that on the 22d October, 1766, *Thomas Morris* made application for three hundred acres of land, to join westerly a survey on a large run which leads into the east branch of the Little Juniata, about a mile eastward from the path that leads from Little Juniata to Susquehanna, in Cumberland county. It was submitted to the jury, as a question of fact, whether there had been a survey made on the ground, whether the survey had been returned, and if not returned, the reason it was not. The court was requested to say: that unless the jury had satisfactory

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evidence that a survey was made by virtue of the application of *Thomas Morris*, before the date of the warrant to *Walter Hood*, the law will presume the application to have been abandoned. That even if the jury are satisfied, that the survey was made previously to the date of the warrant to *Walter Hood*, yet if no money was paid on the application but the fees of office, and no surveying fees were paid before the date of the warrant, and the survey was not returned, the jury, under the circumstances of the case, may consider the application and survey to have been abandoned. The court were further requested to charge the jury, that the doctrine of abandonment does not apply to a descriptive location, (which it was contended this was,) of the year 1766, actually surveyed in 1767, conveyed by deed poll in 1767, re-surveyed in 1796, on the order of the Board of Property of 1794, and patented in 1797.

It was given in charge to the jury, that an application and survey may be abandoned. That whether there was an abandonment or not, depended on the facts found by the jury; but that payment of fees of office, of surveying fees, and returning the survey, are facts tending to repel the presumption of abandonment. That if the application was obtained in 1766, and the land circumscribed by a survey marked on the ground, but the owner of the survey refused to have it completed or returned, and refused on that account, to pay the surveying fees, and it continued in this way until 1785, when the warrant issued to *Walter Hood*, on which he made his survey, the latter would have a preference. In this direction we perceive no error. On the contrary, the charge of the court is in accordance with all the cases, many of which have been cited and relied on in the argument of counsel. The transaction must be viewed as it stood in 1785, when *Walter Hood* obtained his warrant, and made his survey. It is only by shutting our eyes to the state of things at that point of time, that any difficulty can arise; for the real question is, might the jury presume the application to have been then abandoned, or was *Morris* right in considering the application abandoned, when he obtained his warrant. In 1785, as the jury have found, although *Morris* had made an application for the land, and had made a survey, yet the survey had not been returned, because the owner of the survey had not paid the surveying fees. The failure to return the survey is not the fault of the deputy surveyor; but arises from the act or neglect of the party himself, for the deputy surveyor, as has been decided, is not bound to return the survey until the surveying fees have been paid. It would have the most mischievous effect, if it were competent to an individual to put in an application on which he pays no money to the commonwealth, with a description which may apply as well to other tracts, have a survey made upon it, and then by his own act or neglect, without any

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default in the deputy surveyor, withhold the return of survey for near twenty years. It would operate very much to the injury of the commonwealth, as it would enable individuals to obstruct the improvement of the country, by preventing the commonwealth from making a new grant of the land. Even a precisely descriptive warrant must be followed up with reasonable attention, in order to give title, from its date; so also the same course must be pursued on a vague warrant, to give title from the time of survey. If the owner of a vague or removed warrant suffers it to remain unreturned, for more than twenty-one years, and during that time has exercised no acts of ownership upon the land, the State, or any person, has a right to consider it as derelict, and whoever purchases, and pays for the land, under such circumstances, has a good title. 1 Penn. Rep. 74, *Chambers v. Mifflin*. Mr. justice HUSTON, in delivering the opinion of the court, says. "Although a warrant has been surveyed, yet if not returned, the owner may change its lines, or change its place altogether, and lay it on any other vacant land any where near; until it is returned, the State has no power to collect arrears of purchase money. It never can be, that a man can wait thirty or forty years, and all that time, be able to say, this is my land if I please, and not mine unless I please. I will take the land and pay the State for it, if the country improves, and it rises in value, or if somebody will render it valuable by improvement; but I will not take it, and pay the purchase money, unless something occurs to render it more valuable. Nor is it the law, that a man can commence procuring a title, from the State, and from pure negligence leave it in such a situation, for more than twenty years, as that he is not bound to take it, and no one safely can."

The plaintiff in error, relies upon the re-survey in 1796, on the order of the Board of Property, in 1794, and the patent in 1797; and this to be sure would be strong evidence, that after 1785, the owner of the application would not wish to be considered as having relinquished title to the land. But it must be kept in view, that previously to this time, the right of *Walter Hood* had intervened, and that nothing the plaintiff in error could have done afterwards, would effect that right. The question must be determined upon the titles as they stood at the time of the warrant and survey to *Walter Hood*.

Judgment affirmed.



| SORTILE HOLDEN, et al. *against* JAMES P. BULL, Treasurer of Bradford county.

A judgment entered upon a bond, in the penalty of one hundred dollars, with a warrant to confess a judgment, having a condition thereunder written, that the obligor will pay a fine and bill of costs, then uncertain as to amount, is valid.

If an execution issues upon such a judgment, for the penalty, before the real amount due is ascertained, it will be set aside on a writ of error.

ERROR to the Common Pleas of Bradford county.

*Sortile Holden*, together with *Gustavus A. Holden*, as his security, executed a judgment bond to "the treasurer of Bradford county, for the time being," in the penalty of one hundred dollars, with the following condition thereunder written.

"That the said *Sortile Holden*, one of the subscribers, shall well and truly pay, or cause to be paid, a certain fine and bill of costs, agreeably to the sentence of the court of Quarter Sessions, passed upon the said *Sortile Holden*, in consequence of a suit in behalf of the commonwealth against the said *Sortile Holden*, upon which said *Holden* was in prison, and this instrument is taken to cover fine, and all costs which accrued in consequence of said suit. Witness, &c."

The fine and costs not having been paid, the judgment bond was filed, and a *fiery facias* issued thereon: when this writ of error was sued out by the defendants, who assigned the following errors.

1st. The judgment is entered on a bond or promise, conditioned for the performance of matters contingent, doubtful and uncertain, and which require pleadings and trial.

2d. The face of the instrument shows the execution issued for a sum of money, which was not judicially decreed to the plaintiff.

*Ingham*, for defendant in error, whom alone the court heard on the second error assigned, contended that a writ of error was not the proper remedy of the party in a case like this. There was no intention to collect more than the fine and bill of costs off the defendants, and if there was any injury likely to result to them, their proper remedy was to apply to the court below to protect them: or even a judge at his chamber may grant relief. *Lewis v. Smith, 2 Serg. & Rawle, 142.*

Judgment affirmed, and execution set aside.

NATHAN STEWART; et al. *against* ELEAZER BALDWIN

Costs are not recoverable by either party in an action of partition.

Costs are exclusively a matter of statutory creation.

**ERROR** to the Common Pleas of Tioga county.

This was an action of partition brought by *Eleazer Baldwin*, against *Nathan Stewart* and *John Bruce*, in which the defendants plead *non tenent insimul*. The cause having been tried by jury, a verdict and judgment was rendered for the defendants. A *fi. fa.* was then issued against the plaintiff for costs, including a bill of defendants' witnesses, amounting to two hundred and seventy-six dollars and ninety-seven cents.

The plaintiff's counsel obtained a rule to show cause why the *fi. fa.* for costs should not be set aside; on the ground that costs are not recoverable in an action of partition; which at a subsequent term was made absolute. The defendant then sued out this writ of error.

*Greenough*, for plaintiff in error.

A declaration in partition always concludes to the damage of the plaintiff. *Plead. Asst.* 304. If damages are recoverable so are costs. If then the plaintiff may recover costs, the *Stat. 23, Hen. 8*, gives costs to the defendant. Between coparceners damages in partition are not recoverable, but in other cases, where the right to have partition is denied, they are. *2 Bac. Ab. 45, 266. Stat. 17, Edw. 3, ch. 71.*

*Parsons and Willeston*, for defendant in error.

No damages or mesne profits are recoverable in an action of partition, but may be in account render. *2 Bac. Ab. 44. Roberts' Dig. 207.* The *Stat. 23, Hen. 8*, has been restrained to cases of personal wrong. *Penn'a Prac. 150. Sayer on Costs, title Coparceners. Commonwealth v. The Com. of Philad. 8 Serg. & Rawle, 155.* Costs are never recoverable except by statutory provision.

**PER CURIAM.**—We have inquired into the practice since the argument, without having ascertained that there has been a departure from the provisions of the English statutes, according to which costs are not allowed in partition; and however unreasonable this may be, yet costs being exclusively a matter of statutory creation, it is plain that the remedy lies not with us, but with the legislature. The judgment for the defendant without costs was therefore regular.

Judgment affirmed.

The COMMONWEALTH *against* CHRISTIAN FISHER.  
 The same *against* PETER RICHTER. The same *against*  
 FREDERICK KREAMER, and the same *against* LEWIS  
 DEWART.

An application by the owners of property, under the act of 9th April, 1827, for damages done by the location and construction of the Pennsylvania canal is premature, if made after the completion of the canal upon the land of the petitioner, and before the completion of that division of the canal upon which such lands are located.

The right of the State to take and use for public purposes, six out of every hundred acres of land sold, is not an implied right but an express reservation: the State infringes upon no private interest, nor does it injure any man, by using this right; the utmost that can be required is, that it should pay for improvements put by the owner on such part as the State should subsequently use.

When an act of assembly requires *reasonable* notice to be given by one party to the other, ten days, generally, would be sufficient.

The acts of the 25th February, 1826, and 9th April, 1827, on this subject, are to be construed in connection with each other, and by such construction it is necessary that the viewers appointed to assess the damage done to the land of an individual, should, in their report, state the courses, distances and quantity, with such references as will designate the exact property converted to the use of the State.

When the approval of a Court of Quarter Sessions is required by an act of Assembly, to an assessment of damages, that court will not readily set aside a report, on the ground that the damages are excessive, yet it may become their duty so to do. It would be a much stronger case which would authorise the Supreme Court to set aside a report on that ground.

All below high water-mark in the channel of the Susquehanna river, is a public highway, and the State has a right to improve it by deepening it, or it may raise dams in it, and thus swell the water; and if in so doing, a spring, which rises below high water-mark is covered, and which an individual has been accustomed to use, he cannot recover damages therefor, under the act of 9th April, 1827, it is *damnum absque injuria*.

The sixth section of the act of the 10th April, 1826, gave authority to the commissioners, to take releases to the commonwealth from individuals, through whose lands the canal might be thereafter located.

The consideration of such releases, so taken, has not failed, because the eastern and western waters have not been united by that route of the canal along which the releasors live. The consideration is, that the canal shall pass through the land of the releasor.

In each of these cases a *certiorari* was issued, at the instance of the commonwealth, to the Court of Quarter Sessions of Union county, to remove the proceedings which had been instituted by the defendants severally, to recover damages for injury done to their property, by reason of the construction of the Pennsylvania canal.

The same exceptions which were filed in the court below to the confirmation of the several reports, and there overruled, were relied upon here.

1st. The application was not authorised by law, having been made before the completion of the canal.

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2d. The work on the several sections stated in the petition, was not completed when the application was made; nor had the said sections been taken off the hands of the contractors by the canal commissioners. The contracts for making fence on said sections had not been complied with.

3d. Reasonable notice of the time and place of meeting of the viewers, was not given to the nearest acting canal commissioner.

4th. The viewers did not ascertain the quantity, or describe the boundaries, of the land by them valued; nor the quality, nor duration of the estate and interest of the applicant to the same, agreeably to the act of assembly.

5th. The damages are exorbitant, and were assigned without any evidence produced before the viewers.

There was added in *Richter's* case, an exception to the allowance of damages for injury done to a spring, by the backing of the water of the creek upon it.

And in *Dewart's* case, there was this additional exception, "that he had executed a release to the commonwealth of all damage, previously to his application."

*Lashells*, for the commonwealth.

*Donnel* and *Greenough*, with whom was *Sterrett*, for the claimants.

A statement of the whole case, of the several acts of assembly in relation to it, and the positions taken on the one side and the other, are contained very fully in the opinion of the court, which was delivered by

HUSTON, J.—If the first exception is sustainable, it will be unnecessary to consider the second. By the act of the 25th February, 1826, the canal commissioners were authorised to locate, and contract for making a canal, locks and other works necessary thereto, from the river Swatara, at or near Middletown, to or near to a point on the east side of the Susquehanna opposite the mouth of Juniata; and another portion from Pittsburg to Kiskiminitas. This act is entitled, an act to commence a canal, to be constructed at the expense of the State, to be styled "The Pennsylvania Canal." On the 9th April, 1827, was passed, an act to provide for the further extension of the Pennsylvania canal. The first section provides for extending one part, from the eastern section up the Juniata to Lewistown: another up Kiskiminitas and Conemaugh, from the western section of the Pennsylvania canal to Blairsville: and also, a canal, locks and other works necessary thereto, up the valley of the Susquehanna, from the said eastern section of the Pennsylvania canal, to a point at or near Northumberland; to be selected with due regard to the accommodation of the trade of both branches of the river. It is on this last, the lands for which damages are claimed, are situate. It was asking a great deal from this court, when we were required to believe, that from Middletown to Juniata,

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made the year before, was not here called the eastern section; and that it was impossible to ascertain from the law, that it included all that part of the Pennsylvania canal between the mouth of Juniata and Northumberland.

The 8th section provides, "that if any person shall consider himself aggrieved by reason of the canal passing through lands of which he is the owner, or by interfering in any manner with his rights of property, he may at the completion of the work thereupon, or within one year thereafter, petition the Court of Quarter Sessions of the county in which the damage has been committed, and the said court shall thereupon appoint five reputable citizens within the judicial district, of which the said county is a part, and not residing in said county, &c."

It was contended on one side that the phrase, "completion of the work thereupon," meant the completion of the work on that part of the canal which run through the land of the petitioner; and on the other, that it meant the completion of the work on the canal from the eastern section to Northumberland; and we are of opinion, that both the literal meaning of the words, and the whole spirit and scope of the act, require this latter construction. The viewers are to view the premises, and taking into consideration the advantages of said canal to the petitioner, report such damages, if any, as they or any three of them shall think the owner has sustained by reason of said canal; and in case the said viewers are of opinion, the said petitioner has received no damage, or that the advantages derived from the canal are a sufficient compensation to the petitioner for any injury sustained by him, they will also report the same to the said court, &c. Now it is utterly impossible that there can be any advantage from an unfinished canal; it must be completed and the water in it, before any advantage to the community or to an individual can be derived from it. This construction has, we believe, been put upon this law by every tribunal before whom it has come, except the court of Union county.

But the petitioners have endeavored to raise a great question: that the State could not take their lands without compensation: and that compensation must be in money, and must be paid instantly; nay, it was even intimated that the damages ought to have been paid before any damage was done.

Although the petitioners and their counsel have most carefully forgotten certain facts, this court is bound to remember them, if they form a part and an essential and prominent part of the law of the land. From the first settlement of this country, both under the proprietors and the State, the invariable usage and law was, in the sale of vacant land to any applicant, to add six acres for every hundred, for roads, &c. These six acres were never paid for by the applicant: they were not any particular and specific or designated six acres, but they were thrown in, that whenever the

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commonwealth thought a public road necessary, through any part of the State, it might make it without interfering with the private right of any individual. The right of the State to take six acres out of every hundred acres sold, is not an implied right, but an express reservation. It infringes no private right, nor does it injure any man by using this right. The very utmost which can be required is, that it should pay for improvements put by the owner on the part afterwards used by the State.

When the State authorized private corporations to make turn-pike roads or canals, it compelled them to pay for the land occupied by such road or canal: for such corporation was very different from the State; its rights were very different; no reservations had been made for its use, no contract for its benefit. But when the State itself undertook to make public canals, its right was unquestionable. These petitioners, then, ought to be grateful for a bounty given them by the State; to be thankful rather than presumptuous; to acknowledge kindness rather than to assume the attitude of injured persons. If this were not so, if the State had no right to the six acres in every hundred, and was bound, in the strictest manner, to pay for the part appropriated for general and public use, until the canal is completed, it cannot be known how much will be required, nor whether in addition to the part actually occupied, injury will or will not be done to the adjacent lands, nor whether great value may or may not be added to the residue of the farm.

There was a time and there is a case, when some, in their overweening fondness of new and undefined power, spoke of a great State, and the government of a nation, as lightly as of the acts and authorities, and responsibilities of a petty corporation; of the power to make laws for the general welfare, and binding the whole community, as no greater in degree than the resolves of a petty borough. It was forgotten that the latter was restricted by legislative enactment, and the former was the enacting power, with authority unlimited, except in a few particulars, and not answerable for its acts, except to those from whom it received its power, the people. What the government conceives is for the public good it may do; what that public good requires, it may claim, and how compensation is to be made, how it is to be ascertained, and when to be made, must, from the very nature of things, be directed by that very government itself. It may seem pretty to talk of regulating all this by five men, or a Court of Quarter Sessions; but although pretty to talk about, and pleasant to imagine, and profitable too to some, it is not to be carried farther than a little talk and discussion. If ever it shall happen that any actual injury or injustice is done to any citizen, and his case is brought before this court, he will receive redress to the extent of our power. There is nothing like that here: the whole proceeding

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is calculated to prevent the possibility of injury to the citizen in *theory*; and in *practice*, has resulted in injustice to the community. The best thing which could happen to a man was, that he could have some pretext for putting his hand into the treasury; if he is delayed, by having proceeded irregularly, too soon, or illegally, an outcry is raised as though the country was invaded.

Questions on constitutional law are sometimes grave and important, but such occur seldom. Occasion, however, is often taken to discuss them, as applicable to matters on which they have no bearing, which are in themselves among the ordinary subjects of legislation: in fact it is a standing topic, always dragged in where there is nothing else to be said; and, certainly, in this State, it is a ludicrous rather than a serious objection to any measure; I mean as it is commonly applied.

The third objection is to the notice to the canal commissioners. The act requires reasonable notice; ten days, generally, would be reasonable notice; but if several petitioners would hold views on the same day, no notice would be reasonable; so, if given to attend when from particular occurrences it was well known that the canal commissioners could not attend.

The fourth exception is important, and the proceedings are in this particular totally defective. The act of 25th February, 1826, directed the damages to be ascertained by an inquisition, who were directed to ascertain also and describe the bounds of the land by them valued, and the quality and duration of the interest and estate in the same required by the board of canal commissioners for the use of the State; and it provides, that on payment therefor, the State shall be seized of such lands as of an absolute estate in perpetuity, or of such less quantity and duration of interest or estate in the same, or subject to such partial or temporary appropriation, use or occupation, as shall be required and described as aforesaid, as if conveyed by the owner or owners. And as acts on the same subject are to be construed in connexion, the only alteration introduced by the 8th section of the act of 9th April, 1827, as to this particular is, that the five reputable citizens are substituted for the inquest. The State is still to pay for the land, and it is still requisite that it should appear of record what she has paid for, and to what she is entitled. The report must state the courses and distances, and quantity, with such references as will designate the exact property converted to the use of the State. The title which the applicant has for the land must also be always stated. To apply for damages for injury done by sections thirty-nine and forty, or part of forty, is no description; no record is or will be kept of such sections; where each began and ended was once marked by a small stake driven into the ground, as a direction to the labourer, but these are not now to be found, or soon will disappear.

That the damages are exorbitant is another exception. There

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is no specific evidence before this court on this subject, except that lands are valued at above one hundred and twenty dollars per acre, when we know they sell at much less than one half that price. The report is to be *approved* by the court: this implies consideration and judgment; and although a court would not readily interfere on this account, yet it may become their duty so to do. It would be a still stronger case which would justify this court to set aside proceedings on this ground; but I will not say we would not be compelled by a sense of duty so to do in some cases. I am afraid the viewers have been induced, somehow or other, to put a wrong construction on the act of assembly: they are bound to take into view the advantages of the canal to the petitioner; now if he values his whole tract of land five or ten dollars per acre more than he estimated it to be worth before the canal was made, this is the value of the canal to him; and it is inconceivable how an honest man can, on his oath, say a person has sustained damage by a canal which has increased the value of his estate five or fifteen hundred dollars.

As to *Richter's* spring, I do not know that we have facts enough before us, from which to form a satisfactory opinion. This much however, may be said: all within the channel of the river is a public highway, except the islands. The State, for the purpose of improving the natural channel, or making an artificial one, may make it deeper in some parts, and drain or make shallow other parts; or it may raise dams partially or entirely across the river, and thus swell the water, and this may constantly or occasionally cover a spring rising below high water mark; or may deepen the water at the out-let of a spring above high water mark, and thus occasion it to be covered oftener with back water; all this it may do, and he who used the water of that spring must submit to it as an evil, incident like many other evils, as well as advantages, to a situation on the bank of a large navigable stream. It is no uncommon thing to find springs between low and high water mark, along the Susquehanna, and such are often a matter of convenience at some seasons of the year, to those who live near; but the State never sold any land below high water mark, and it is ridiculous to talk gravely of a great national work being obstructed, because a man will be deprived of the use of what was never his own.

The additional exception in the case of *Lewis Dewart*, remains to be considered: "that he had executed a release to the commonwealth, previously to the date of his petition for the appointment of viewers." That release was in these words:

"KNOW ALL MEN BY THESE PRESENTS, That we, the subscribers, for and in consideration of the benefit to be derived to us from the Pennsylvania canal passing through our land, or in the neighbourhood thereof, have agreed, and hereby do agree with the



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commonwealth of Pennsylvania, each for 'himself, his heirs and assigns, that the said commonwealth's commissioners, engineers, superintendents, workmen, or others employed by or under the authority of the commonwealth, may freely, and without charge, enter upon, occupy, use and keep so much of our land as may be deemed necessary for a canal, and for the basins, locks, towing-paths, embankments and other devices whatever, which may be necessary therefor, and such portion of land on each side, not exceeding in width fifty feet, as may be required or thought convenient; and may freely and without charge, enter upon any part of our land, and take therefrom, for the use of the commonwealth, all such stone, earth, or other materials whatever, excepting timber, as may be found needful or useful in the construction of the said canal and works; and we do hereby remise, release, and forever quit claim to the commonwealth, all, and all manner of claim or demand for damages or compensation for land so taken or occupied; for stone, earth, or other materials, excepting timber, taken or used; and for all and every injury that may be sustained, by reason or in consequence of such occupation and taking, or of entering upon and taking materials, or of excavating our land for obtaining the same, or otherwise howsoever."

The counsel for Mr. *Dewart* insisted, that the commissioners had no power to take a release. This must have been insisted on before reading the 6th section of the act of the 10th April, 1826, which expressly directs the commissioners to call upon, or direct to be called on, and receive from all and every person or persons, as far as conveniently can be done, who are the owners of land along or near the several proposed lines of communication between the eastern and western waters, acquittances or releases from any claim to damages, in case the said line of communication shall pass through their land, or for materials which may be taken to carry on the work. The principal objection, however, was founded on the assumption of the fact, that the release was signed under the idea that a water communication could be made the whole distance to Lake Erie, and that communication would be through the lands of the signers, and by the way of the west branch of the Susquehanna.

It may be admitted that some persons on the Juniata, once said a communication by water could be made on that route; that some persons on the west branch said there could be a connected water communication by that route, and that each was believed by those who knew nothing of the route, and had never crossed the Allegheny mountains; but it is not admitted that any man of sense, who knew the country, and who was not blinded by his interest, ever said so, or thought it practicable; nor did any engineer. Nor is it true that our acts of assembly sanction the idea that one canal,

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and only one, was to be made; or that if a canal could not be made the whole distance, none was to be undertaken. The first law, of 11th April, 1825, directs examinations to be made from Philadelphia to Pittsburg, by the way of the west branch—by the way of Juniata, and from Pittsburg to Lake Erie; one other from Philadelphia to the northern boundary of the State towards Seneca or Cayuga lakes; one other through Cumberland and Franklin counties to the Potomac; one other to the Potomac by Conewago, and one to connect the proposed Chesapeake and Ohio canal with the Juniata route.

Under this act, *Mitchell, Geddis*, and others, had examined the head waters of the Susquehanna, and there remained no doubt on the subject; it was certain no continued water communication could be made. But a clamour was raised by those on the west branch, of whom such conduct might have been expected, and some of whom it ought not to have been expected, which drove from the State one of the best engineers ever in her employ, and a man of as much honour as capacity: I mean *James Geddis*. On the 25th February, 1826, we find the next act. The people on the Juniata had sense and honesty enough, to have by this time admitted there must be a portage on that route: some few on the west branch still clamoured about an entire water communication, and insisted loudly, that if a portage was necessary, it would be easier and shorter by that route: but I deny that, at that time, one man of sense in the State, believed in the practicability of a water communication, connecting the eastern and western waters. The preamble to that law has been relied on, "Whereas the construction of a canal for the purpose of connecting the eastern and western waters, is believed to be practicable," &c. not a canal connecting, but "*for the purpose of connecting*:" and it directs the part from Middletown to the Juniata, and from Pittsburg to Kiskiminitas to be begun.

The next act on this subject is that of the 10th April, 1826, the sixth section of which I have before recited, and which authorises the taking of releases. Every man in the legislature, and every well informed man in the State, at that time, knew that it was contemplated to go to Pittsburg, by the Juniata route; and also to go up the Susquehanna, and up both branches of it, the first to facilitate the trade with the western States, and the latter for the benefit of our own citizens. Although the work on both branches is now partially suspended, it is only suspended. In all countries, in all ages, those who have improved the navigation of their country, or constructed canals, have been considered the benefactors of their country, and their policy the wisest and the best. Clamour and sectional feeling, and narrow local policy may interrupt the improvement of the State, and have interrupted it, but the counsel and the court have spoken without authority when they say it is

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abandoned. I am not sure it was not wise to suspend it until what was began should be completed.

There is nothing more unsafe than to throw away the release itself, its plain and obvious meaning, and to look for its construction in preambles to acts of assembly, or judge of it from party squabbles. It is made "in consideration of the benefit to be derived from the Pennsylvania canal passing through our lands," not one word about eastern or western waters, nor allusion to them, or the connecting them by continued water communication, or portage by land; nor a word about the north eastern branch of the Susquehanna. The Pennsylvania canal does pass through the lands of the petitioner, and is in progress up each branch of the Susquehanna, his release therefore takes effect.

It is obvious the petitioner assumes positions somewhat inconsistent with each other; first, he says he must be paid before the whole canal is completed; nay, before that section is completed which passes through his lands; and next he says, his release is not to bind him, because the canal is not completed, and no appropriation for putting any more of it under contract this year; in every way he asks to gain.

We are of opinion that this release is too plain to admit of doubt, and forever estops the applicant from demanding from the State, what has solemnly been released to it. But it is said, that he did not own all the lands, for which the viewers have given damages, at the time he executed the release. The record, however, exhibits nothing on this subject: it is true his counsel have offered to us a deed for part of the lands, dated in 1827, a year after the release. This is not regularly before us, nor, if it was, is it quite conclusive that he did not own the land *in fact*, a year before he got his deed. Something has also been said about his owning another tract in the neighbourhood, which he gave in exchange for this: how far, or whether in any way, a man who has released can get clear of the effect thereof by exchanges of property, is not before us; and we say nothing of its effect. Some of the land he owned when the release was executed; it is all valued together. The objections to the proceedings in the other cases, particularly the defect of designation in the report of viewers, apply to this.

Proceedings in all the cases reversed.

MICHAEL SMITH *against* JAMES JOHNSTON.

By a sale, conveyance and delivery of possession of land, the grain growing thereon does not pass to the vendee.

WRIT of error to the Common Pleas of Columbia county, where it was an action of trover, brought by *Michael Smith* against *James Johnston*.

The case was this: *Charles Clark* being the owner of a farm, had leased it to *Michael Smith*, the plaintiff in error, who was also the plaintiff below, for one year, which was to end on the 1st April, 1828. The terms of the lease were, that the tenant was to deliver a certain portion of the grain to the landlord, in the bushel. In the month of February, 1828, *Clark* sold the farm to *Johnston*, the defendant, and conveyed it to him by deed in common form. *Johnston* went into possession on the 1st April, 1828.

The question of law which arose in the case was, whether *Johnston*, the purchaser, was entitled to the landlord's share of the grain in the ground, which was reaped in the harvest of 1828.

The court below was of opinion, that the deed from *Clark* to *Johnston*, conveying the farm, "and the rents, issues and profits thereof," vested the right to the landlord's share in the purchaser of the land, and the jury found accordingly.

*Frick*, for plaintiff in error, contended that grain growing in the ground is personal property, and will not pass by a conveyance of the land. *Toll. Law of Ex.* 149. By the act of assembly, a sheriff's deed conveys real estate as fully as the defendant could convey it; and it was held in *Myers v. White*, 1 *Rawle*, 356, that a sale by the sheriff of land, upon a *Lev. Fas.* on a mortgage, did not pass the grain growing thereon.

The right to the grain was a personal right, which accrued to the landlord the moment the grain was sown.

*Grier*, for defendant in error. The conveyance of the land, and the rents, issues and profits thereof, is a conveyance of every thing growing upon the land. *Foote v. Colvin*, 3 *Johns. Rep.* 222.

The opinion of the court was delivered by

GIBSON, C. J.—It is a little remarkable that the precise point in this case, has not been decided in England or this country. The reason may be, that the subject is usually disposed of by some preliminary stipulation. There is, indeed, a *dictum* of Mr. justice SPENCER, in delivering the opinion of the court, in *Foot v. Colvin*, 3 *Johns.* 222, that a sale of the land simply, by the owner of both the land and the crop, carries the crop to the purchaser; which, with great respect for the opinions of that learned judge, seems to be unsupported by decision or analogy. Mr. *Roberts* is the only elementary writer who asserts that the products of the soil, whether

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spontaneous or cultivated, accompany the freehold until they are actually severed, unless when sold in prospect of such severance; and the cases referred to in the margin of the book, *Roberts on Frauds*, 126, certainly do not prove that corn growing is as much a part of the freehold as grass or timber trees; or that it is part of the freehold at all. On the contrary, all the authorities agree, that as against the heir, it goes to the executor, though it seems to be settled that it passes by a devise of the land, and, in conformity to authority, it was so determined by this court, in *McCullough's Appeal*, 4 Yeates, 23. The reason for this distinction, attempted in *Gilbert's Evidence*, 250, is, that "every man's donation being taken most strongly against himself, shall pass not only the land itself, but the chattels which BELONG to the land; but no chattels can descend to the heir: they go to the executor. Why this is accounted a chattel, we have shown already." And in doing so, he had just given a few quaint, but substantial reasons why corn growing does not belong to the land. "It follows," the chief baron had said, "that there ought to be another property in the corn, distinct from the land, inasmuch as there is labour in acquiring and sowing the corn distinct from the labour whereby the land was at first occupied and gotten; also, there is a distinct charge in sowing the corn from the money whereby the land was purchased. The law, following nature, doth erect a distinct property in the corn, different from the land." And again, "there is a property in the corn, distinct from the soil, before the corn is committed to the earth, and that property is not lost by sowing in a man's own soil; for I cannot loose the property of what is my own, by putting it in a place which is also my own. But if I sow my corn in another man's soil, it ceases to be mine." Still further. "Because a man expects a yearly return of the corn he sows, it is reckoned part of his PERSONAL estate, as the corn was before it was sown. But otherwise of timber trees planted, for they must be supposed to be annexed to the soil, since they were planted, with the prospect that they could not come to their full use and perfection, till many generations afterwards." Thus far chief baron *Gilbert*, who gives good reasons why the growing crop should be considered a chattel, in contra-distinction to timber trees; and satisfactorily exposes the foundation of the rule by which a tenant having attempted to retain the ownership of the land after the expiration of his estate by sowing it out of season, looses the crop, as in the case of an adverse recovery; but who, in the opinion of Mr. *Hargrave*, is less happy in accounting for the distinction which gives corn growing to a devisee, but denies it to the heir. *Co. Litt.* 55, b. note 2. The truth is, the distinction rests altogether on authority, but authority so unquestionable as not to be shaken. Even in point of reason, however, a further distinction might be taken between a will, in the construction of which a presumption of intention may be raised from circumstances, and a deed of which the

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construction is to be made from the technical effect of the words. Now in *Poole's* case, 1 *Salk.* 368, corn growing is said without qualification to be a chattel; and the same thing is asserted in *Whipple v. Foote*, 2 *Johns.* 452. *Newcomb v. Ramer*, *Id.* in note, and *Stewart v. Doughty*, 9 *Johns.* 108, as well as by chief baron *Gilbert* in the passages just quoted. As a chattel, then, there is no reason why it should pass by a bargain and sale of the land, which would not be equally applicable to cattle depastured on the land. But whatever may be the law in England or our sister States, it is clearly settled by usage and judicial decision here, that, except by devise, the crop does not pass as parcel of the land. The practice of reserving the crop has, I believe, been universal; insomuch that when the reservation is not expressly declared, it is nevertheless a tacit condition of the contract. In the very case at bar, it appears from the evidence sent up, that the vendee had no thought of claiming the crop, till it was suggested by a neighbor. In accordance, with the popular notion, grain in the ground was treated as a chattel, in *Welsh v. Becky*, 1 *Penns'a.* 57. and subjected to the rule which requires an actual or a symbolical delivery in the case of a conditional sale. Still nearer to the point is *Myers v. White*, 1 *Rawle*, 353, in which it was determined that the sheriff may not sell grain in the ground, by virtue of a *levari facias* on a mortgage; and in *Stambaugh v. Yeates*, *MSS Chambersburg*, 1828, it was held, that, although it may be sold as personal property on a *fi. fa.* it does not pass by a levy and sale of the land on a *venditioni exponas*. According then to an incontestible principle asserted in *Foote v. Colvin*, that a sale on an execution passes whatever the debtor might pass by a voluntary conveyance, the preceding case is substantially in point. If the crop be an accessory of the land, it will follow its principal as readily by the one conveyance as the other: if it be not, I know not how it is to pass by words inapplicable to it in either. It seems, therefore, the judge who tried the cause, erred in directing the jury, that in the absence of an actual reservation the crop would go to the vendee.

Judgment reversed, and a *venire de novo* awarded.

**BENJAMIN CHEW'S** Executor *against* **JESSE MATHERS'**  
Administrator.

B. C. sells, by articles of agreement, to J. M. a tract of land, for which he is to execute a conveyance upon the payment of the purchase money, for which he takes a judgment bond from J. M. Subsequently B. C. enters the judgment bond, issues a *fi. fa.*, levies upon the land, which is afterwards sold by the sheriff, and B. C. becomes the purchaser, for a sum less than one half of the judgment. *Held:* That such sale and purchase is an equitable extinguishment of the whole amount of the judgment.

ERROR to the Court of Common Pleas of Columbia county.

This was a *scire facias* to revive a judgment, to which the defendant plead payment, with leave to give the special matter in evidence.

The defendant, to support the issue on his part, proved that the consideration of the original judgment bond, was a tract of land, sold by the executors of *Benjamin Chew*, deceased, to the defendant, in 1818, by articles of agreement, by which it was stipulated that *Mathers* was not to get a deed for the land until the purchase money was paid; that in 1821, a *fi. fa.* was issued upon that judgment, which was levied upon the land so sold by the plaintiff to the defendant; that in 1823, a *venditioni exponas* was issued, upon which the property was advertised for sale by the sheriff; that while the crier was offering the property for sale, the plaintiff's attorney was inquired of what kind of title the purchaser would get, whether the executors of *Benjamin Chew*, deceased, would make a deed to the purchaser? To which he answered, that the purchaser would get the title of the defendant *Mathers*, subject to the payment of the purchase money. The persons who made the inquiry then refused to bid, and the property was struck down to the plaintiff's attorney, for nine hundred and fifty dollars, and a deed was subsequently made and acknowledged to the plaintiff.

The plaintiff claimed to recover in this suit the amount of the original judgment, after allowing a credit of the nine hundred and fifty dollars, for which *Mathers'* title sold by the sheriff. But at all events he claimed to be entitled to recover the amount, after allowing the defendant a credit for the real value of the land at that time, to be estimated by the jury.

The court below, (*Chapman*, president,) was of opinion, and so instructed the jury, that if they believed the land was sold subject to the payment of the purchase money, on the original contract between *Chew* and *Mathers*, and bought in by the plaintiff, that it was an extinguishment of the whole judgment, and the plaintiff could not recover. The jury found for the defendant.

The opinion of the court was assigned as error.

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Grier, for plaintiff in error. The facts of this case do not create a legal extinguishment of the debt; and equity will not interfere to protect the defendant against a compliance with his contract to pay the money claimed. Chew holding the legal title to the land, stood, in relation to his vendee, in the nature of a mortgagor; he might either pursue the land by an ejectment to compel the payment of the purchase money, or he might pursue his personal remedy upon the judgment bond: he elects to pursue the latter course, by issuing a *fi. fa.* upon which the sheriff might have levied upon the defendant's personal property, or upon other land of the defendant than that sold to him by the plaintiff: the sale of either of which would not have been an extinguishment of the judgment to an amount greater than the proceeds; but because it so happened that this land was levied and sold first, the whole amount of the judgment is to be extinguished.

The sale would have passed the whole estate to the purchaser, *Liggett v. Edwards*, *Hopkin's Chan. Rep.* 530; and the opinion given by the attorney of the plaintiff, in the execution upon which it was selling, would not alter the legal effect of such sale. It was but an opinion, and not imposed as terms of sale. But if by this opinion the defendant was prejudiced, we offered on the trial to remedy it by allowing him a credit for the then value of the land.

Frick, for defendant in error, whom the court declined to hear.

The opinion of the court was delivered by

GIBSON, C. J.—In England, a legal estate cannot be sold, nor an equitable one levied, on an execution; so that the rights which spring from judicial sales of equitable estates here, are necessarily peculiar to ourselves. In *Purviance v. Lemon*, 16 *Serg. & Rawle*, 292, the nature of these rights was considered as between the original vendor and vendee, and a principle established, which covers the ground of the present controversy—that a destruction of the relation of trustee and *cestui que trust*, by re-uniting the equitable to the legal estate, is virtually a rescision of the contract. The vendor is a trustee to the extent of the payments of the vendee, who, by tendering the whole purchase money, entitles himself to a conveyance. What would be the relation of the parties here, were the vendor, after having extinguished the vendee's estate by getting it in at the sheriff's sale, to enforce his judgment for the residue of the purchase money? It will be admitted that he could not keep the estate and compel the vendee to pay for it: he entertains no such views. But having received the whole purchase money, would he be bound to convey the whole estate under the original contract, or only the portion of it for which the vendee had newly paid? If the former, then the sheriff's sale must have left the rights and interests of the parties precisely as it found them; and in that view, the vendee might, by paying the last shilling,



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entitle himself to the estate, in defiance of a judicial sale of his interest. That would be monstrous. Yet the rights and the remedies of the parties, must necessarily be reciprocal; and if the vendee may not treat the purchase as still subsisting, neither can the vendor. But the residue of the price can be demanded only on the foot of the contract, for the performance of which the bond is but a security, and the judgment an instrument. The vendor, therefore, would not be bound to convey the whole estate, but would by consequence be considered as having permanently regained at least a part of it. That would, however, introduce a relation of the parties not contemplated by the original contract; and besides, bring the case exactly to the circumstances of *Purviance v. Lemon*, except that the chain of transmission from the vendor to the vendee, and back again to the vendor, had in that case an additional link. In every view, then, it seems that the extinguishment of the vendee's estate by a re-conveyance, was a disaffirmance of the contract, and an equitable payment of the judgment.

Judgment affirmed.

PETER DECKER, for the use of JOHN FRYTENBERGER,  
against ABRAHAM EISENHAUER and HENRY BOLANDER.

If the payor of a note stands by and sees it assigned to a third person, without giving the assignee notice of an existing defence, he shall afterwards pay the amount of the note to the assignee, although the consideration thereof should have entirely failed; and whether his conduct proceeded from ignorance or design.

THIS was an appeal from the Circuit Court of Union county, held by justice HUSTON.

The case is fully stated in the opinion of the court.

*Greenough*, for appellant.—To sustain the position, that an obligor, who stands by and sees his bond assigned to a third person, cannot afterwards avail himself of any defence, which then existed, cited *Gordon v. The N. Amer. Ins. Co.* 1 Bin. 434. 5 Wils. Bac. Ab. 47-49. 3 Wils. Bac. Ab. 301. *Salmon v. Rance*, 3 Serg. & Rawle, 311.

*Lashells*, contra—insisted that no reported case sustained the position that a man's silence would make him liable when otherwise he would not be. It was the duty of the assignee to ask the obligors, if they had a defence. Cited *Elliott v. Callan*, 1 Penn. Rep. 24. *Davis v. Barr*, 9 Serg. & Rawle, 137. *McMullen v. Wenner*, 16 Serg. & Rawle, 18.

(*Peter Decker* for the use of *John Frytenberger v. Abraham Eisenhauer* and *Henry Bolander*.)

The opinion of the court was delivered by

**SMITH, J.**—This is an appeal from the Circuit Court, held by justice **HUSTON**, for the county of Union, in April last. The appellant moves this court for a new trial, on the ground that the verdict is against the weight of evidence in the cause, and the law arising from it. In order that the case and the decision of the court may be understood, it may be necessary to state somewhat minutely the prominent facts in the cause, as they appeared in evidence.

*Peter Decker*, about the beginning of April, 1818, purchased from *Frederick Stees*, a farm near Middle creek, in Union county, adjoining lands of *Henry Bolander* and others. This farm consisted of several pieces or tracts of land, all adjoining and making but one plantation.

On the 23d of April, 1818, *Peter Decker* mortgaged this land to *Frederick Stees*, to secure a part of the original purchase money. On the 14th of June, 1819, he sold and conveyed to *Abraham Eisenhauer*, a son-in-law of *Henry Bolander*, twenty-seven acres and one hundred and fourteen perches of the land covered by the mortgage, for the consideration of one thousand and seventy-seven dollars and seventy-three cents, a small part of which, to wit, about one hundred and thirty dollars was paid in cash. For the residue, (upwards of nine hundred dollars,) *Eisenhauer* gave nine single bills, (the subject of this suit,) with *Henry Bolander* as security. *Abraham Eisenhauer* took possession of his purchase, and remained thereon, until sometime in 1829, when the mortgage was put in suit, judgment recovered, and the said twenty-seven acres and one hundred and fourteen perches, were sold to *Barbara Mourer*, a daughter of *Henry Bolander*, for four hundred and ninety dollars.

Sometime before the 1st of July, 1820, (the precise time does not appear from the evidence,) *John Frytenberger* went to live with *Peter Decker*, and loaned him three hundred pounds. He did not remain long with *Decker*, but being dissatisfied, went to *Henry Bolander's*, and while he was living there, *Eisenhauer* and *Bolander* both told him there was a mortgage against *Decker*. *Peter Decker* swears; (and he is not contradicted,) that *Eisenhauer* knew of the mortgage to *Steas*, when he purchased the twenty-seven acres and one hundred and fourteen perches, and in consequence of it, insisted upon having a good and sufficient bond of indemnity; that a bond of indemnity was accordingly executed and left with the deed; that *Eisenhauer* was not satisfied with the bond, because bail was not in it, but took it, together with the deed, gave his bills as above mentioned, and about six years afterwards said he had burnt the bond of indemnity.

On the 1st of July, 1820, *Decker*, *Frytenberger*, *Eisenhauer*, and *Bolander* met together, when *Decker* assigned the single bills in

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question to *Frytenberger*, in part satisfaction of the three hundred pounds, which he had borrowed of him. *Henry Bolander* wrote three of the assignments himself; at this time or before, neither *Bolander*, nor *Eisenhauer* intimated that they had any grounds of defence; and *Frytenberger*, on being asked by *Decker*, why he pressed him so, answered, that it was because *Eisenhauer* and *Bolander* said there was a mortgage against him. There was no evidence whatever that *Frytenberger* knew or had heard that the twenty-seven acres, sold to *Eisenhauer*, were encumbered, or that the single bills in question were given for that land.

The obligor cannot be compelled to pay a bond, or single bill, given on the purchase of land, the title to which proves to be bad: although the assignee is in no better condition in general than the obligee, yet if the obligor has promoted and encouraged the assignment, the case is different. This distinction was fully recognized by the learned judge before whom the cause was tried, but it would appear that it was not regarded by the jury. It therefore becomes necessary, in order to prevent injustice, to set aside their verdict and grant another trial. The defendants say, they ought not to pay the single bills, because they were given for the purchase money of land incumbered by a mortgage, for which it was eventually sold. The appellant, however, replies, that although this would have availed you as respects *Decker*; yet as you stood by, and saw him assign these bills to me for a valuable consideration, without informing me of the defect of title, as you, on the contrary, carefully concealed it from me, and assisted in preparing the assignments, your defence in the present action is inequitable and unjust. In *Rudy and wife v. Wenner*, 16 Serg. & Rawle, 21, justice ROGERS, in delivering the opinion of this court, says, that if, before the assignment, the assignee calls on the obligor, and informs him, that he is about to take an assignment of his bond, and the obligor acknowledges it is due, without any allegation of defence, he shall not be permitted to take defence against the assignee. And this whether his silence proceeds from *ignorance or design*. The present chief justice, in *Davis v. Barr*, 9 Serg. & Rawle, 141, says, "that to exclude all transactions between the original parties it is necessary, that it should appear the assignee took the assignment at the instance of the obligor, or at least, that the latter stood by with full knowledge of his rights, and without disclosing them. Now in this case, we find, that both *Bolander* and the other defendant, *Eisenhauer*, whilst *Frytenberger* lived with the former, knew of the incumbrance; *Decker* swears, that when he sold the twenty-seven acres, *Eisenhauer* knew of the mortgage to *Steas*, and for that reason, insisted on having a good and sufficient bond of indemnity, although to an entire stranger, it might appear uncertain, from the face of the mortgage as written, whether the

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land sold, was included in it, and it is said, without the aid of a draft, it cannot be ascertained, yet, it seems to us, that *Eisenhauer*, at least, if not *Bolander*, must have been acquainted with the extent of the mortgage. This farm belonged to *Frederick Stees*, who had long resided in that neighborhood, it adjoined *Henry Bolander's* farm, who had also resided there a long time. *Decker* bought in 1818, and sold to *Eishenhauer* in 1819; and as it was a cash sale, it is reasonable to suppose, both *Eishenhauer*, and his father-in-law, would make inquiry, either of Mr. *Steas*, or at the recorder's office, respecting the title, before they purchased, to say the least of it, they had every motive and opportunity to inform themselves; and *Decker* swears positively, that he told *Eishenhauer* of the mortgage, who in consequence of it, required a bond of indemnity. With this knowledge, they, *Decker* and *Frytenberger*, on the first of July, 1820, met together, and *Decker* assigned the single bills to *Frytenberger*, in part satisfaction of the three hundred pounds. During the whole transaction, not a whisper is heard or hinted as to a defence: and the mortgage, though well known to one, if not to both of the defendants, was never mentioned; good faith to *Frytenberger* required them to speak out at this time; instead of which, they are not only silent, but by their conduct actually promote the transfers. Under such circumstances, this court is constrained to say, as it did in the case of *Stannard v. Callan*, 1 Pen. Rep. 31, that the conduct of the obligors, whether it proceeded from ignorance or design, must bar them from setting up a defence, with any hope of success, against *Frytenberger*, the equitable assignee. I am of the opinion, that by their silence, when they ought to have spoken, and by their whole conduct when assembled on the 1st of July, 1820, they promoted and induced the assignment, and cannot now, in justice and reason, refuse to pay the single bills. Under all the circumstances, we are of the opinion, the cause ought to be reheard; and therefore set aside the verdict, by reversing the judgment, and granting a new trial.

HUSTON, J.—It often happens that judges differ in opinion as to a particular case, much oftener than on general principles. The court in granting new trials, ought to be very careful in their statement of facts, for it is read to the jury, and by them, too often, considered as evidence of such facts. I say this, because in the statement of the facts of this case by the judge, there is much which was not proved so strongly as here stated; some things not proved at all, and it is said a point was not contradicted, which was the turning point in the cause, and which, certainly, the jury found to be different from what is here assumed. The cause turned on whether *Hochenbury* or *Decker*, was to be believed; or whether *Bolander* knew of the mortgage, when the bonds were assigned; and the cause was left to the jury on those facts. I heard the testimo-

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ny, observed the witnesses, their manner, and considered their situation and interest, and I was perfectly satisfied with the verdict, and that it was not contrary to the evidence given; though it might be wrong, if statements of counsel were any evidence at all.  
New trial granted.

### WILLIAM WILLARD, et al. against SAMUEL W. MORRIS.

A sale of real estate by the sheriff, upon a junior judgment, divests the lien of a prior mortgage upon the same land.

A trial, upon the plea of payment, is not a waiver by the defendant of a joinder in demurrer to another plea put in by him; thus when there is a joinder in demurrer, and the defendant is legally entitled to a judgment thereon in his favour, but the cause being tried, upon the plea of payment, and a verdict rendered for the plaintiff, it is error for the court to enter a judgment upon that verdict.

WRIT of error to the Common Pleas of Tioga county.

This was a *scire facias sur mortgage*, at the suit of *Samuel W. Morris* against *Roswell B. Alford*, and on motion *William Willard*, who had purchased the mortgaged premises upon a sale by the sheriff, was admitted a co-defendant.

The cause being at issue upon the plea of payment, with leave, &c. and ordered on for trial: *William Willard*, by his counsel, plead specially—"that a judgment had been obtained against *Roswell B. Alford*, subsequently to the mortgage, upon which a *fi. fa.* was issued and levied upon the mortgaged premises, which were afterwards condemned, and sold, upon a *venditioni exponas*, by the sheriff to the said *William Willard*, for fifty dollars, and that a deed therefor had been regularly acknowledged in open court and delivered to him."

To this plea the plaintiff demurred, and the defendant joined in the demurrer.

The cause was then tried, and a verdict rendered for the plaintiff, for the amount of the mortgage, one thousand dollars, and interest. The court entered judgment for the plaintiff.

*Lewis*, for plaintiffs in error, who was informed by the court, that the point involved in this cause had already been determined.

*Ellis*, with whom was *Williston*, for defendant in error, declined an argument of the point which the court intimated had been settled, that a sale upon a junior judgment divested the lien of a mortgage; but contended that it did not arise in this case, because the party had waived the demurrer, and did not ask the court to render any judgment upon it, but went on to trial upon the merits, on the plea of payment.

The judgment of the Court of Common Pleas was reversed, and judgment entered for the defendants.

## / STEINBRIDGE'S Appeal.

Upon an appeal from the decree of the Court of Common Pleas, distributing the proceeds of real estate sold by the sheriff, the affidavit must be made by the party, it is insufficient if made by the attorney.

The order of the Court of Common Pleas, opening a judgment and letting the defendant into a defence, does not destroy the lien from the original date of its entry.

THIS was an appeal from the decree of the Court of Common Pleas of Northumberland county, distributing the proceeds of the sale by the sheriff, of the real estate of *Henry Donnel*.

On the 9th June, 1818, *George Boyer* obtained a judgment by default against *Henry Donnel*, in an action of debt, for two thousand dollars. On the 22d August, 1818, this entry was made upon the docket: "On motion and affidavit filed, judgment opened, and defendant, *Henry Donnel*, let into a defence." On the 23d January, 1819, "judgment by consent for the plaintiff, for one thousand one hundred and thirty-one dollars and eleven cents."

On the 22d January, 1819, *H. G. Steinbridge* obtained a judgment against *Henry Donnel*, for one hundred and fifty-seven dollars and sixty cents.

The lien of each of the judgments was preserved from the time of their original entry, until the sale of the defendant's real estate by the sheriff.

The question in the court below was, whether the order of the court of the 22d August, 1819, opening the judgment of *George Boyer*, and letting the defendants into a defence, did not destroy the lien of the judgment; which was not again acquired until the 23d January, 1819, one day after *Steinbridge* obtained his judgment.

The opinion of the court below was, that the judgment was opened merely for the purpose of letting the defendant make defence, and that the lien remained: and therefore decreed in favour of *George Boyer*, from which decree *Steinbridge* appealed.

In this court a motion was made to quash the appeal, on the ground, that the affidavit upon which it was founded, was made by the attorney, and not by the party.

*Bradford and Merrill*, for appellant.

*Greenough and Packer*, for appellee.

PER CURIAM.—The appeal is to be had on terms prescribed in the sixth section of the act of the 11th March, 1809, as we have heretofore determined; and in *Bryan v. McCullough*, at the present term, *ante*, 421, we held that the words of the law are too peremptory to allow the affidavit, which is made a requisite preliminary to an appeal, equally with a writ of error, to be made by any one but the party. The inconvenience of this, if any should result,

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will doubtless be remedied by the legislature, to whom the subject exclusively belongs. But this is immaterial here, as the proceedings are to be affirmed on the merits. A judgment may be opened, or it may be set aside. If the former, it remains a judgment still, and with all the attributes as such, of which the order of the court has not deprived it. Here it was opened to let the party into not even a full defence: consequently it was no further disturbed, than to effect that object. Sometimes the judgment is expressly ordered to stand as a security *ex majore cautela*; but that is unnecessary. By the construction of the acts of assembly, by which lands may be seized in execution, lien is an incident of every judgment, and of which it can be deprived only by being set aside. That was not done here, and the court below determined correctly, that the lien existed from the first rendition.

Decree affirmed.

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DANIEL LEMON *against* The Administrator with the will annexed of BENJAMIN THOMPSON.

H. S. conveyed a house and lot to D. L., in consideration whereof D. L. executed eight single bills of fifty dollars each to B. T. and eight to J. K. in which B. T. was his security. D. L. and B. T. entered into an agreement by which the deed from H. S. was to remain in the hands of B. T. as a security for the payment of the eight notes due to him, and the eight notes due to J. K. in which B. T. was security. B. T. afterwards, and before the payment of the said notes, died, having first made a will, by which he devised to the wife of D. L. the aforesaid house and lot. *Held:* That such devise released D. L. from the payment of the eight single bills to B. T. but did not release him from the payment of the eight single bills to J. K. in which B. T. was security.

WRIT of error to the Common Pleas of Union county.

This was an amicable action of debt, in which *Henry Yearick*, administrator with the will annexed, of *Benjamin Thompson*, was plaintiff, and *Daniel Lemon* was defendant.

The following facts were agreed to be considered in the nature of a special verdict, with leave to either party to take out a writ of error.

*Henry Springer* and wife, on the 30th day of March, 1822, executed a deed to *Daniel Lemon* for a house and lot of ground in New Berlin. On the same day, *Daniel Lemon* executed eight single bills, to *Benjamin Thompson*, seven of which were for fifty dollars each, the first payable April 1st, 1823, and so on annually, on the 1st day of April in each year, and the other for the payment of forty dollars, on the 1st April, 1830. Same day, *Benjamin Thompson* and *Daniel Lemon*, executed eight single bills to *John Kelley*,

(Daniel Lemon v. the administrators, with the will annexed of Benjamin Thompson.)

for like sum, payable as above. Same day, *Benjamin Thompson* and *Daniel Lemon*, entered into the following agreement in writing, to wit: "March 30, 1822, it is agreed that the above deed shall lay in the hands of *Benjamin Thompson*, as a pledge, till the payments to *Kelly* and *Thompson* are all made, for the property purchased of *Springer*, in New Berlin; and when made, the said *Thompson*, or his executors or administrators, shall deliver the deed to *Lemon*, his heirs, executors or administrators."

It is further agreed, that the consideration for the house and lot in New Berlin, conveyed by the said *Henry Springer* to said *Lemon*, was paid to said *Springer* by said *Kelly* and *Thompson*.

It is further agreed, that said *Thompson* made his last will and testament, which is duly proved and recorded in New Berlin, by which the said *Thompson* devised the said house and lot mentioned in the above deed, to the wife of the said *Daniel Lemon*.

The question is, whether *Daniel Lemon* is obliged to pay the single bills above mentioned, as given by him to said *Thompson*; and also, whether he or the administrator with the will annexed, is obliged by law to pay the said single bills to *John Kelly*.

If the court should be of opinion that *Lemon* is not obliged to pay the said single bills, then judgment to be for defendant; otherwise for plaintiff.

Opinion of the court, (*Chapman*, president.)

"In this case stated, the court are of opinion, that *Benjamin Thompson* devises to his daughter, the wife of *Daniel Lemon*, all his interest in and arising out of his house and lot, in New Berlin. This is evidently the intention of the testator, otherwise his daughter would take nothing by the devise; by which *Daniel Lemon* is clearly exonerated from the payment of the single bills given by him to *Benjamin Thompson*, for the purchase money; but he is not exonerated from the payment of those single bills given by him to *Kelly*, as part of the purchase money. If *Lemon* was obliged to pay all the purchase money, his wife could take nothing by the devise; the court in the above case order judgment for the plaintiff as far as the bonds to *Kelly* are concerned, and judgment for the defendant as far as the bonds to *Thompson* are concerned."

*Merrill*, for plaintiff in error, contended that the court below should have entered judgment generally for the defendant.

*Lashells*, contra.

Judgment affirmed.



**ABRAHAM D. HAHN and JOSEPH RHOADS against  
LEONARD SMITH.**

The land of D. H. having been levied, and advertised for sale by the sheriff on a *venditioni exponas*, before the day of sale, D. H. by a verbal agreement, transferred the surplus of what the land might sell for, beyond the payment of incumbrances, to L. S. to indemnify him against certain liabilities. Two days after the sale, before the deed was acknowledged, and before all the purchase money was paid, A. D. H. entered a judgment against D. H. and issued a *fi. fa.* with directions to the sheriff to retain the surplus. *Held:* That the judgment entered after the day of sale was not a lien on land; and that the *fi. fa.* could not take the money, because the agreement between D. H. and L. S. was a legal transfer of it before it issued.

**ERROR to Union county.**

This was an amicable action, in which *Leonard Smith* was the plaintiff, and *Abraham D. Hahn* and *Joseph Rhoads* were the defendants. It was an issue to try the right to money in the hands of the sheriff, which arose out of the sale of the real estate of *Daniel Huntzecher*, under the following facts:

Judgments had been obtained against *Huntzecher* to the amount of two thousand six hundred and six dollars and fifty-three cents, upon some of which executions were issued, and levied upon his real estate, and which was advertised for sale by the sheriff. *Leonard Smith*, the plaintiff, was security in two debts which *Huntzecher* owed, amounting to about three hundred and sixty one dollars, and which were not secured by judgment. After the property was advertised, and before the day of sale, *Smith* went to *Huntzecher*, to know how he would secure him against the payment of the two debts for which he was his bail; *Huntzecher* replied that he had no way to save him, unless he would buy the property at the sheriff's sale; that it was worth more than the amount of the judgments against it, and if he would buy it, he should have the surplus as an indemnity against the payment of those claims. *Smith*, in pursuance of this agreement, made an arrangement with the judgment creditors of *Huntzecher*, which enabled him to buy the property at sheriff's sale, and it was struck down to him by the sheriff, on the 27th June, 1829, for two thousand nine hundred and seventy five dollars. On the 7th July, 1829, *Huntzecher* gave *Smith* a written order on the sheriff to pay him the balance of the purchase money after the payment of the liens. On the 16th of September, 1829, *Smith* having paid all his purchase money, the sheriff acknowledged the deed to him. *Smith*, in pursuance of the agreement and order of *Huntzecher*, then claimed three hundred and five dollars and thirty-six cents, from the sheriff, being the balance after the payment of the liens, which existed against the land on the day of sale.

Abraham D. Hahn and Joseph Rhoads v. Leonard Smith.

This balance was claimed also, by *Hahn* and *Rhoads*, under the following circumstances. On the same day *Huntzecker's* land was sold, but after the sale, he executed a judgment bond to *Hahn* for two hundred dollars, which was entered on record on the 29th June, 1829, and upon which, on the 1st August, 1829, an execution issued, with direction to the sheriff to levy upon, or retain this balance of three hundred and five dollars and thirty-six cents.

*Rhoads*, on the 1st July, 1829, obtained a judgment bond from *Huntzecker*, which was entered of record on the 14th July, 1829, and which he claimed to be a lien on the land, and entitled to the residue of this balance, after the payment of *Hahn's* judgment and execution.

The court below, (*Chapman*, president,) was of opinion, that the judgments of *Hahn* and *Rhoads*, entered after the sale by the sheriff, were not liens upon the land, although the deed to the purchaser was not acknowledged until a subsequent time; and that the acknowledgment of the deed had relation back to the time of sale.

The court was also of opinion, that the agreement between *Huntzecker* and *Smith*, in relation to the surplus after the payment of liens, and the order of *Huntzecker* to the sheriff, in favor of *Smith*, was a legal appropriation or transfer of that surplus, and therefore the execution in favor of *Hahn* was not a lien upon it in the hands of the sheriff. Judgment was therefore rendered for the plaintiff. To which opinion the defendants excepted.

*Sterrett*, for plaintiffs in error.

*Merrill* and *Lashells*, contra.

Judgment affirmed.

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### DANIEL LEMON *against* JOHN BISHOP.

Where a plaintiff and defendant reside in the same town, a copy of a notice to take depositions left at the house of the defendant, with the defendant's daughter, by the plaintiff, more than ten days before the day appointed for taking the depositions, is not a sufficient service of notice.

ERROR to the Common Pleas of Union county.

Upon the trial of this cause in the court below, the plaintiff offered in evidence a deposition, which the defendant objected to, on the ground that legal notice of the taking of it had not been given to him.

*Daniel Lemon*, the plaintiff, having been sworn, said, he left a copy of the notice more than ten days before the taking of the deposition, at *Bishop's* house; he gave it to his daughter, who was about eighteen years of age. *Bishop* was not at home, and his

(Daniel Lemon v. John Bishop.)

wife was unwell; his daughter said he was at Weirichstown, about four miles from home; he did not see *Bishop*, after the notice was served, until after the deposition was taken; he did not call in the evening to see if *Bishop* got the notice. They live in the same town, about two squares from each other; he, the plaintiff, left town the next morning, and did not return until after the deposition had been taken.

The court did not deem the notice sufficient, and overruled the evidence. The rule of court on the subject did not provide for the kind of service of notice which was necessary.

*Merrill*, for plaintiff in error, cited *Bauman & wife v. Zinn*, et al. 3, *Yeates*, 157. *Bujac v. Morgan*, 3 *Yeates*, 258.

*Lashells*, contra, cited *Voris v. Smith* 13, *Serg. & Rawle*, 394.  
Judgment affirmed.

1 PW 486;  
23 SC 436

### ABEL WHITE *against* MARY WEEKS.

Where no consideration is expressed in a deed of bargain and sale, parol evidence may be given to show that a consideration did pass from the grantee to the grantor.

WRIT of error to the Common Pleas of Lycoming county.

This was an action of ejectment brought by *Mary Weeks*, the defendant in error, against *Abel White*.

The plaintiff, in order to make out her title to the land in controversy, offered in evidence a deed of which the following is a copy, together with parol evidence of the consideration thereof.

"I do hereby sell, assign, transfer and set over unto *Mary Weeks*, any piece, tract or parcel of land which may be found to belong to me, as part of my purchase of the estate of *Jesse Weeks*, deceased; provided nevertheless, that this grant shall not be taken or construed in any manner to interfere with *Samuel M Lees*, or to include any land granted, or intended to be granted in my deed, dated 30th July, 1825, to said *Samuel M Lees*.

"Witness my hand and seal, January 14th, 1826.

"*Elijah Babbitt*," [SEAL.]

This evidence was objected to by the defendant, the objection was overruled by the court, and exception taken.

*Campbell*, for plaintiff in error.

No particular set of words are necessary to constitute a deed of bargain and sale. 1 *Wils. Bac. Ab.* 468. *Jackson v. Alexander*, 3 *Johns. Rep.* 484. To the validity of such a deed a valuable consideration is essential. 1 *Wils. Bac. Ab.* 469. *Jackson v. Sebring*,

(Abel White v. Mary Weeks.)

16 *Johns. Rep.* 515. And that consideration must be expressed in the body of the deed; no parol evidence can be given thereof, unless it be contained in the deed, that a consideration did pass, then only can it be proved by parol what that consideration was. *Moore v. Bieham*, 4 *Bin.* 1. *Peake's Ev.* 121. *Mildmay's Case*, 1 *Coke's Rep.* 176. 1 *Phil. Ev.* 495. *Sears v. Brink*, 3 *Johns. Rep.* 211. 1 *Phil. Ev.* 501-2. 3 *Stark. Ev.* 995-7.

The statute of frauds and perjuries would be violated, in its spirit, by the admission of parol evidence to make this a good deed. If the consideration can be supplied by parol, so may also any other material part. The quality of the estate granted may be made out by parol, or the quantity of the land increased or diminished. The practice of expressing the consideration in the deed is almost universal, hence is a strong proof of its necessity.

*Anthony*, for defendant in error.

A deed under seal imports a consideration, whether expressed or not. *Robts. on Fraud. Con.* 119; but if it is not expressed, it may be proved by parol. 11 *Coke's Rep.* 24-5. *Jackson v. Fish*, 10 *Johns. Rep.* 456. *Hartley v. McAnulty*, 4 *Yeates*, 95. 3 *Stark. Ev.* 1004. *Devenport v. Mason*, 15 *Mass.* 92. 1 *Phil. Ev.* 481-2. *Langley v. Brown*, 2 *Atks.* 202.

In *Moore v. Bieham*, 4 *Bin.* 1, this question is not raised, much less decided, for in that case the parol evidence was not offered.

If the deed was defective for want of an expressed consideration, the defendant could not take advantage of it.

Judgment affirmed.

### GEORGE HONNITER against JAMES BROWN.

A judgment was rendered by a justice of the peace for the plaintiff, the defendant appealed to the Common Pleas, he afterwards appealed from an award of arbitrators against him, and paid the costs. Upon a trial of the cause by a jury, the defendant gave evidence which had not been given to the justice nor to the arbitrators, and a general verdict was rendered in his favour. *Held*: That he was entitled to recover from the plaintiff the costs which he had paid upon the appeal.

**ERROR to the Common Pleas of Lycoming county.**

This suit, in which *James Brown*, the defendant in error, was plaintiff below, and *George Honniter* was defendant, originated before a justice of the peace, who rendered a judgment in favour of the plaintiff for eighty dollars, from which the defendant appealed to the Common Pleas, where the cause was referred under the compulsory arbitration law; the arbitrators made a report in favour of the plaintiff for ninety dollars. From this award the

(George Honniter v. James Brown.)

defendant again appealed, and paid the costs, amounting to thirty dollars. The cause was afterwards tried by a jury, and a verdict and judgment rendered for the defendant. The defendant gave evidence to the jury which had not been given to the justice, nor to the arbitrators.

The question in the court below was, whether the defendant was entitled to recover from the plaintiff the costs which he had paid when he appealed from the award of arbitrators.

That court determined that the costs paid upon the appeal, under the circumstances of this case, were not recoverable from the plaintiff.

*Parsons*, for plaintiff in error. The defendant, having given new evidence to the jury, cannot recover his own costs; under the circumstances of this case, each party must pay his own, but those which the defendant seeks to recover are the costs of the plaintiff, paid by him on the appeal. *Gonsalus v. Liggett*, 1 *Rawle*, 427.

*Armstrong and Anthony*, for defendant in error. Cited *Fleck*, v. *Boucher*, 16 *Serg. & Rawle*, 378. *Sheaffer v. Landis*, 1 *Serg. & Rawle*, 449. *Kimble v. Saunders*, 10 *Serg. & Rawle*, 193. *Purd. Dig.* 20.

This court was of opinion that the defendant was entitled to recover the costs paid by him on the appeal.

Judgment reversed.

## APPENDIX.

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[Several cases having been omitted in their proper places, from circumstances not under the control of the reporters, they are introduced here.]

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### WESTERN DISTRICT—SEPTEMBER TERM, 1829.

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ELI EVANS *against* JONATHAN BEATTY, JOHN BEATTY,  
and WILLIAM BEATTY.

#### IN ERROR.

When it was proposed to sell depreciation lands at auction, the country was divided into districts, and the lands surveyed. And when the plan of sale by auction was abandoned, and the country thrown open to settlement, or sale in the ordinary mode by warrant from the land office, the country was again divided into districts.

It is understood that the boundaries of these districts of 1792, were not the same, in general, with the boundaries of the depreciation districts.

If the surveyors of adjoining districts agreed upon the dividing line between their respective districts, or adopted a line already run, such line is to be considered the line between them; although it should be ascertained by survey to give the district less, or more, than by law was allotted to a district; and surveys made by the surveyors of the respective districts within such line, in their respective districts, are good.

After the lapse of forty years, evidence is not required how such line was run, when run, or by whom: on proof that the respective surveyors had surveyed to such ancient line as a boundary in their respective districts, it should be considered as the regular legal district line.

WRIT of error to the Common Pleas of Beaver county.

*Fetterman*, for the plaintiff in error.

*Moore and Selden*, for the defendant in error.

The facts of the case are fully stated in the opinion of the court, which was delivered by

HUSTON, J.—The plaintiff here was plaintiff below, and brought his ejectment to recover a tract of land, under the following circumstances:

In the spring of 1790, *James Hillman* settled on the land in question, intending to hold it by improvement. In 1797 he sold his possession and right to *J. Beatty*, for eight hundred dollars. Of this, four hundred dollars were paid in cash, and the remaining four hundred dollars were retained until it was ascertained whether the

(Eli Evans v. Jonathan Beatty, John Beatty and William Beatty )

lands could be held by improvement, or would be taken from the settler by any of the warrants which heretofore may have been taken out; a bond was given for this money, and both the article and bond were assigned to the plaintiff.

Several points were discussed and decided by the Court of Common Pleas, which it is not considered necessary to detail. The opinion of the court was right on each point. But one matter was agitated which we think ought to be put to rest speedily. The population company had warrants in the hands of the deputy surveyor. The lands in question had been surveyed as depreciation lands, and the warrants of the population company applied to those depreciation surveys, and so far the case of *McCrea* and *Plummer*, decided this case. But it was alleged that the lands in question did not lie in the district of *Jonathan Leet*, who returned them, and the *sixth section of the act of the 2d of April, 1792*, declares any survey made by any deputy surveyor, out of his district, void and of no effect. When it was proposed to sell the depreciation lands at auction, the country was divided into districts, and the lands surveyed. When the plan of sale by auction was abandoned, and the country thrown open to settlement, or sale in the ordinary mode by warrant from the land office, the country was again divided into districts, and deputy surveyors appointed. It is understood that the boundaries of these districts in 1792 were not the same in general with the boundaries of the depreciation districts. When the country began to settle, certain lines were known and shown as district lines: and it was not always distinguished whether the line spoken of was a line of a depreciation district, or of a district of 1792.

In the testimony in this case we find some confusion, from not distinguishing what district line the witness was speaking of.

The deputation and instructions of the surveyor general to *Jonathan Leet*, were given in evidence. They refer to the district of *John Hogue*, and to other marks of designation. In order to ascertain the line between *Hogue's* and *Leet's* district, a Mr. *Martin* had began at the western line of the State, and run east eleven miles and one hundred and seventeen perches; (why he did not run twelve miles, the distance called for, does not appear.) He then run south to the Ohio, found a line which he says he heard of before, that it was *Cunningham's* line, and again he says it was called a district line.

*John Hogue's* commission was not shown at the trial, nor have we it now. The counsel have assumed, and I shall assume, that his district was to adjoin the western line of the State, and to be bounded south by the Ohio river, and to extend east from the State line, twelve miles, and it seems that the line to which he surveyed, and all on the east side of which was surveyed and returned by *Leet*, is not twelve miles east of the State line.

(Eli Evans v. Jonathan Beatty, John Beatty and William Beatty.)

Whether *John Hogue* followed the meanders of the Ohio twelve miles, and thus made much less than twelve miles *due* east; or whether there was an old division line between two depreciation districts, which *Hogue* and *Leet* agreed should be the line between their districts, or whether, as I believe the fact was, the surveyor general was mistaken in the extent of the country east and west; and that there was not distance to allow each district the allotted space, I know not, nor is it material. The act directed districts to be designated, and a deputy surveyor to be appointed for each; and each to confine himself to his district; for the safety and security of those who should become owners of lands in that part of the State.

It was perfectly immaterial to all but *John Hogue* and *Jonathan Leet*, whether the north and south line, which divided their districts, was nine, or ten, or eleven, or twelve miles east from the western line of the State. But it was most material that *John Hogue* and *Jonathan Leet* should agree on a line, which should be the line of their respective districts, and that *John Hogue* should confine his surveying to the west side, and *Leet* his surveying to the east side of that line. They did, it seems, agree, and run such a line, or find it already run, and adopted it. There is no allegation that admitting this to be the line of their districts, that either has ever passed beyond it.

The plaintiff contends that he must, at all events, give *Hogue* his distance, twelve miles, due east. This idea followed on, will give *Leet* his distance due east, and thus bring him into the district of his neighbour to the east. And thus, under the pretext of doing every thing correctly, unsettle the titles to a few hundred tracts of land. The same spirit would inquire whether more skilful men, with better instruments, would not change the line between Pennsylvania and Maryland, Pennsylvania and Ohio and New York; and the same spirit has been endeavouring to pick a few acres out of every tract of land, when any overplus in the survey occurred, and rob a man of his whole land, if carelessness or inattention, or something worse, in the surveyor, or chainman, or marker, has left something undone, or done any thing wrong.

Better, said a great judge, on a very solemn occasion, to give a new construction, and entirely different legal effect to certain expressions, than to unsettle or overturn ten thousand estates.

We are not called on here to introduce any thing new into the jurisprudence of our country. When the line of a surveyor of a district is in question, we have adhered to it, when it can be ascertained that it was run at a particular place, that it did injury to no one at the time, and that it has become a land-mark of property. The court was then right in directing the jury, that if they had evidence to prove the line spoken of by the witnesses, to have been



(Eli Evans v. Jonathan Beatty, John Beatty and William Beatty.)

adopted as the division line, the surveys being in *Leet's* district, according to that line, would be good.

Length of time has added force to the principle in this case. After the lapse of nearly forty years, I would not require any evidence of how it was run, or when run, or by whom. On proof that one had surveyed west of it, and to it as a boundary, and the other east of it, and to it as a boundary, I would consider it the regular legal district line, totally superior to all attack or dispute, by sharp measurers or prowling regulators, of whatever description; no matter under what pretext or excuse they attempted to destroy titles and disturb the peace of the community.

Judgment affirmed.

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## JACOB LEINHART *against* DEWALT FORRINGER.

### IN ERROR.

In an action for money had and received, brought to April term, 1825, to recover the amount paid on an article of agreement for the sale of land, which was entered into between the parties, in the year 1800, where nothing had been done by the defendant until 1824, which would entitle the plaintiff to rescind the contract, the statute of limitations is insufficient to bar the action.

ERROR to the Court of Common Pleas of Butler county.

This case was argued by  
*Gilmore* for the plaintiff in error,  
*Ayres*, contra.

The facts of the case are fully stated in the opinion of the court, as delivered by

GIBSON, C. J.—In the year 1800, the parties entered into articles, in which it was declared that the plaintiff below had bought of the defendant one hundred acres of land on the head waters of Sugar creek, and that the plaintiff had “the right and title for the said land.” There was no covenant that the defendant would convey: indeed the person who drew the article appears to have been altogether unskilled in the business of a scrivener, or the ordinary import of the most familiar words. The plaintiff paid the purchase money without going into possession, and took no further step till about the year 1815, when in consequence of having understood that the defendant had conveyed the land to a stranger, he directed one *Gilleland*, to request the defendant to return the purchase money, which the defendant refused to do, but offered to give the

(Jacob Leinhart v. Dewalt Forringer.)

land. On this footing the matter was again suffered to rest till 1824, when one *Croll* called on the defendant, (whether on behalf of the plaintiff does not explicitly appear,) and asked him to show the land which the plaintiff had bought of him; on which the defendant said "he had no land, and that he did not know, nor had ever seen *Leinhart*," (the plaintiff.) *Croll* then desired "to know for certain about the land;" and the defendant "still declared that he did not know *Leinhart*." *Croll* then asked "if he would know any thing supposing he would see the article and receipt;" to which *Forringer* said, "he did not want to see the article, and still declared he did not know the man," but said "that if this deponent (*Croll*) wanted to buy land, he had one hundred acres on Little Sugar creek that he would sell." This is an exact statement of the whole case, the material parts of which are in the very words of the parties or witnesses; and we are to bear in mind, that the only question raised on the record, is whether this action to recover back the purchase money which was brought to April term, 1825, is barred by the statute of limitations.

The statute never begins to run before the right of action has accrued; which in a case like the present, is when the defendant has put it in the power of the plaintiff to rescind the contract. While it remains in force, the vendee cannot allege that the purchase money was paid to his own use; when, by the terms of the contract, it was paid to the use of the vendor. When did the conduct of the defendant first authorise the plaintiff to dispense with the contract here? For fifteen years both parties were content to let the matter stand on its original footing; but the plaintiff having called then for a return of the purchase money, the defendant, as he had a right to do, (having done nothing amiss,) insisted on holding him to the bargain, and in this state matters remained till 1824, previous to which, the remedy of the plaintiff, if he had any, was an action of covenant in affirmance of the contract, against which the statute would not have run. It is clear then, that as no implied assumpsit arose till within a few months before the commencement of the present suit, a right of action for this cause did not previously accrue within the intent and meaning of the statute. It is no objection, that the cause of action in substance accrued immediately after the execution of the articles, and that there is no essential difference between this action on an ideal promise, and an action on the covenant, the object of both being damages for a breach of the contract. Be it so; but why therefore is this action to be put on a footing more unfavourable than that of an action of covenant against which the statute does not run? The matter is determinable by the form of the action; and there is nothing to give rise to an implied assumpsit before the contract was renounced by the defendant in 1824. Previous to that, there was no fraud in the concoction of the agreement, or act done which would have entitled either

(Jacob Leinhart v. Dewalt Forringer.)

party to rescind. It was not shown that the defendant had conveyed to a stranger, or, if it had been so, that the plaintiff was apprised of the fact six years before the commencement of his action; without which the cause of action could not have accrued at a period sufficiently early to bar him; which is the only point submitted to us. Whether the defence ought to have been sustained on grounds independent of the statute, is not the question. That matter passed without exception at the trial, and is consequently not before us here. But even on the merits, I would hold that the plaintiff ought to recover. Both parties have shown such backwardness as would preclude either, but especially the defendant, from calling for a specific execution; and although a chancellor will sometimes refuse to execute a contract, for reasons that would be insufficient to rescind it, but leave the party to his remedy at law, yet here, in the absence of a covenant to convey, I can discern no remedy on the contract, by which the plaintiff could recover back the purchase money in the shape of damages or otherwise. It surely will not be insisted, that the defendant ought to be suffered to keep the money and the land too; but that consequence would be inevitable, did not his denial of the bargain *ipso facto* entitle the plaintiff to an action in disaffirmance of the contract. It seems to me there was enough in the circumstances of the case to enable the jury to infer, that *Croll* acted for the plaintiff when the defendant denied the bargain; and unquestionably the plaintiff might renounce the contract after it had been repudiated by the defendant. But that matter was settled without exception at the trial; and here the point raised is the supposed effect of the statute of limitations, which a majority of the court deem insufficient to bar the action.

Judgment affirmed.

WILLIAM MEREDITH *against* THOMAS SHEWALL.

## IN ERROR.

The sheriff is a competent witness to prove the words, "Proceedings stayed by plaintiff's attorney," which had been endorsed on a writ of *liberari facias*, and signed by the sheriff, and which were struck out or erased by a line run through them, though still legible, were his return to that writ, and that *he* had not struck them out.

It is competent to prove, and that by the sheriff, that upon such writ of *liberari facias*, he did not deliver the land to the plaintiff; although it was set forth in the inquisition returned with the writ, that the sheriff and inquest had caused to be delivered the property extended, "until the debt and damages in the same writ mentioned, together with the interest, &c. be fully levied."

An inquest under a *liberari facias* can only determine the value of the land, the yearly rents and profits, and the term during which it shall be extended. The delivery of the land is the executive duty of the sheriff alone.

ERROR to the Court of Common Pleas of Fayette county; where a verdict and judgment were had in favour of the defendant, to which the plaintiff took this writ.

The cause was argued by

*Irwin*, for the plaintiff in error, and by

*Ewing*, for the defendant in error.

The facts of the case are fully stated in the opinion of the court, which was delivered by

SMITH, J.—The parties entered an amicable action, to try their right to the proceeds arising from the sale of the real estate of a certain *Stewart H. Whitehill*, which they respectively claimed under judgments against him. All objections to the form of suit were waived; and the plaintiff claimed two hundred and eleven dollars of those proceeds, (which sum, it is agreed, is in the defendant's hands,) as so much money had and received by the defendant to his use. The cause was tried on the 8th of March, 1828. On the trial, the plaintiff gave in evidence the record of an action to December term, 1818, in the Common Pleas of Fayette county, between *Maurice* and *William Wurtz*, plaintiffs, and the said *Stewart H. Whitehill*, defendant, in which the former had obtained a judgment on the 16th of January, 1819, for five hundred and ninety-eight dollars and seventy-eight cents, and had afterwards transferred it to the plaintiff, *Meredith*, a *plurius fieri facias* thereon to March term, 1820, which was returned "levied on fifty acres of land, &c. inquisition held and extended."

The defendant then gave in evidence the inquisition of extension on the said last mentioned writ, and a *liberari facias* thereon to March term, 1821, with the inquisition attached.

(William Meredith v. Thomas Shewall.)

The plaintiff then offered *Daniel P. Lynch*, former sheriff, to prove that the words, "Proceedings stayed by plaintiff's attorney," which had been endorsed on the writ of *liberari facias*, signed *Daniel P. Lynch*, and which were struck out or erased, by a line run through them, though they were still legible, were his return to that writ; and that those words were not struck out by him; and to prove also, that there was no actual delivery of the property specified in the *liberari facias* to *Maurice* and *William Wurtz*.

This being objected to by the defendant's counsel, the offer was overruled by the court, and a bill of exceptions sealed.

The sole question before us is, whether the sheriff was a competent witness to prove that his return to the *liberari facias* had not been erased by himself, and that he did not in fact, deliver the possession of the land.

We think he was a competent witness for these purposes, and ought to have been received.

The general rule undoubtedly is, that a sheriff cannot be admitted to contradict his return; as to himself, it is conclusive; but it is not, under all circumstances, conclusive as to others. But in regard to the first branch of the offer, *Daniel P. Lynch* was not called to contradict, he was called to support, the return which he had made.

He had, in pursuance of his duty, endorsed it on the writ, which he delivered into court, and which, when shown, exhibited it erased; and he was brought forward to testify that he did not erase or strike it out. Certainly nothing can be plainer than that in proving this, he would not impugn the record of his official act, but maintain it. It would lead to the most mischievous consequences, if courts were precluded from all inquiry relative to matters of this description. In *Hill and wife v. Wigget*, 2 Vern. 547, an entry in the steward's book, and parol proof by the foreman of the jury, were received as good evidence, that a *feme covert* surrendered her *whole* estate, although the surrender upon the roll, and the admission thereon, were but of a *moiety*.

In the present case it was evidently proper for the court and jury to know the truth of this transaction. If the sheriff did not alter his return, who did? Was it done with the consent of the parties, fraudulently or otherwise? That the sheriff did not alter it, was the first step in the investigation; and who so likely or proper to prove that negative fact as the sheriff himself? The circumstance of the erasure alone, apparent upon the production of the writ, was sufficient to authorise an inquiry into the fact, in order to ascertain when, by whom, and wherefore it had been made. The object of the offer was to restore to the proceedings what had been improperly obliterated, and it would indeed be a singular way of protecting records, to shut out the most direct means of proving their violation. It is clear, then, that the sheriff

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should have been admitted to prove, that he had made his return as it originally stood in the endorsement on the writ, and that he did not erase or alter it. There is nothing in the inquisition, which, in our opinion, fortifies the objection to this part of the offer, because after the inquest had discharged their appropriate functions, the sheriff might, without repugnance or inconsistency, have stayed further proceedings, by order of the plaintiff, as will be explained in considering the residue of the offer. This was to prove by the sheriff, that he did not in fact, deliver the land mentioned in the *liberari facias* to Maurice and William Wurtz. It is said that this was properly rejected, because the sheriff returned in the body of the inquisition, that he had delivered the land to the plaintiffs, and it is contended that although he did not *actually* deliver it to them, or ever paid or satisfied their judgment, (the oldest lien,) yet they are concluded by such return, which operates as a discharge of their judgment. As I have said before, the conclusive effect of a regular return of the sheriff, is not to be disputed. It is in general of so high regard, that no averment should be admitted against it. But even when regular, it is not to be extended beyond its reasonable intendment, to prejudice the interests of parties. Where a sheriff returns "goods levied," without any specification, the plaintiff is not precluded, nor those claiming under him, from showing that he was not satisfied. 5 Bin 206. And when a return is irregular and illegal, it may be inquired into and impugned. In *Weidman v. Weitzel*, 13 Serg. & Rawle, 96, a sheriff's return to a *feri facias* of "debt and costs paid," made two years out of time, and less than a year after the commencement of the suit in which it was given in evidence, was held to be unworthy the name of a regular return, by which the plaintiff should be concluded. So in a case between *Pennock's Executor* and *Griffith and George Carr*, (not yet reported,) it was decided at the last term at Sunbury, by this court, that a return of *nulla bona* to *feri facias*, which had been retained in the sheriff's hands, for six years, was not conclusive; that the purchaser of the defendant's property, might show that the plaintiff in the *feri facias* had been satisfied; and the sheriff himself was examined touching the facts. See also 1 Maule & Selw. 599. 9 John. Rep. 96. Here, in the principal case, the alleged return of the sheriff, with regard to the delivery of the land, is contained in the inquisition under the *liberari facias*; and before he could deliver the land to the plaintiffs, a proper inquisition was necessary under this writ. The office of this inquisition is distinct from that under the *feri facias*, it is to ascertain the value of the land, and the clear yearly rents and profits beyond all reprises, and the number of years within seven, that will be necessary to satisfy the debt, damages and costs; according to which the sheriff must deliver possession, and return his writ with the inquisition annexed. This inquisition does more than perform its legi-

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timate functions, it states that the sheriff and inquest had caused to be delivered to *Maurice and William Wurtz* the property extended "until the debt and damages in the same writ mentioned, together with the interest thereof, be fully levied;" whereas the inquest under a *liberari facias* can only determine the value of the land, the yearly rents and profits, and the term during which it shall be extended. The jury have nothing to do with the delivery of the land, that is the executive duty of the sheriff alone. So, it was said in *Sparron and Mattersock and others*, *Cro. Car.* 319, were all the precedents. It is evident, then, that the act of delivering the land must follow the inquisition, even if regularly taken under the *liberari facias*; the proceedings may well be stayed subsequently to the inquisition, and before actual delivery; and the sheriff may return the order to stay them, as his reason for not delivering pursuant to the exigency of the writ. The plaintiff proposed to show that the proceedings were stayed, that the land was not actually delivered, and that his judgment was not satisfied. The answer was, that though the proceedings were stayed, though the land was not delivered, and though his judgment was not satisfied in point of fact, yet the return in the inquisition precluded him from showing the fact, because that return was conclusive. It is apparent, however, that the irregularity and illegality of that proceeding are such as to deprive it of all pretensions to legal sanctity, and to remove any impediment which a regular and legal return might have presented to the admission of the offered testimony. The alleged return is indeed nothing more than the inquisition of the sheriff and jury, and when no actual delivery of the land was made, it would be most strange, if the inquisition, which regularly and legally precludes the delivery by the sheriff, should be held to preclude the proof relative to that subsequent fact, when it was offered to show, by the sheriff himself, that he did not actually deliver the land. The plaintiff should have been permitted to prove what he proposed, and in rejecting the offer under consideration, the court below erred.

Judgment reversed, and a *venire de novo* awarded.

NEAL M<sup>c</sup>COY and MARY his wife, heirs of THOMAS TULL,  
deceased, *against* EPHRAIM TURK.

IN ERROR.

The treasurers of the respective counties, are the proper persons to make sale of unseated lands, to pay the arrearages of taxes: and the act of the 13th March, 1815, which gives them this authority, alters and supplies so much of the act of the 3d of April, 1804, as required a warrant from the commissioners of the county, to issue to the sheriff or coroner, in case of a sale as aforesaid.

ERROR to the Court of Common Pleas of Butler county.

This was an ejectment brought in the court below, by *McCoy* and wife, *against Ephraim Turk*, to recover a tract of two hundred acres of land, in the first donation district of Butler county, No. 200.

It was admitted on the trial, that there was a patent to *Thomas Tull* for the tract of land for which the ejectment was brought, and also, that *Mary McCoy* was his sole heir.

The defendant then gave in evidence, first, the duplicate of the assessment for Muddy creek township, for the year 1816-17.

Then the return of the supervisors of the said township, for the year 1816-17, to the commissioners of Butler county.

The deed from the treasurer of Butler county, dated 13th August, 1818, for the tract of land in question, under which the defendant claimed, was then offered in evidence and objected to, which objection was overruled, and the deed read in evidence.

The jury found for the defendant, and this writ of error was taken. *Bredin*, for the plaintiff in error.

The court below erred in the admission of the treasurer's deed.

1st. Because the treasurer of Butler county commenced his sales of unseated lands in the year 1818, and before two years had elapsed from the commencement of the sales in 1816, or the time fixed by law for the sales in 1816.

2d. That no warrant had been issued by the commissioners to the treasurer, commanding him to sell the unseated lands in said county.

Two other errors were assigned and afterwards abandoned.

*Ayres*, for defendant in error.

The opinion of the court was delivered by

ROGERS, J.—Two objections have been made to the admission of the treasurer's deed in evidence. That the treasurer commenced his sales of unseated lands in 1818, and before two years had elapsed from the commencement of the sale in 1816. And that no warrant had been issued by the commissioners to the treasurer, commanding him to sell the unseated lands.



(Neal M'Coy and Mary his wife, heirs of Thomas Tull, deceased, v. Ephraim Turk.)

The first question has been already disposed of in *Hyner v. Coryell*, decided at the last term in Sunbury, and not yet reported.

In the second section of the act of the 3d April, 1804, the commissioners of the county are directed to issue their warrants, under their hands and seals of office, directed to the sheriff or coroner, commanding him to make public sale of the whole, or any part of such tracts of unseated land, as he may find necessary for the payment of taxes.

The act of the 13th March, 1815, which repeals so much of the act of the 3d April, 1804, as it alters and supplies, devolves these duties on the treasurer. The first section enacts that the treasurers in the respective counties, &c. shall be, and they are hereby respectively authorised and *directed* to commence on the second Monday in June, in the year one thousand eight hundred and sixteen, and at the expiration of every two years thereafter, &c. to make public sale of the whole or part, &c. as will pay the arrearages of taxes. It would seem to be the intention of the legislature by this enactment, to simplify the process of sale; for that, which under the act of 1804, was the duty of the commissioners, and the sheriff or coroner, is authorised and *directed* to be done by the treasurer alone. A warrant from the commissioners which was before in terms required, has been dispensed with. The treasurer derives his powers from the act itself, which is his warrant, commanding him, without the intervention of any other authority to sell, and fixing the times of sale biennially, commencing the second Monday of June, 1816. And from this construction, no inconvenience can result, as the treasurer possesses all the information necessary for the proper discharge of the duties imposed upon him, and must be supposed to be perfectly acquainted with the whole fiscal concerns of the county. The act of the 13th March 1815, in which respect it alters and supplies the act of 1804, vests the treasurer with the control of the whole process for the sale of unseated lands for payment of taxes, and we are not to suppose that the powers conferred upon him will be abused for purposes of private gain.

The two first errors having been properly abandoned, it is the opinion of the court that the judgment be affirmed.

Judgment affirmed.

PETER W. LITTLE and MARY his wife, and JOHN M'FARLAND and ELIZABETH his wife, *against* ROBERT HODGE and DANIEL CLARK.

# IN ERROR

The mode of appropriating donations in land, to the officers and soldiers of the Pennsylvania line, in the revolution, adopted after the war.

The officers of the government entrusted with the appropriation of donation land, could at no time give a patent to an applicant for any tract he might ask.

A patent for a tract of donation land is void, unless given after drawing, and for the number drawn.

If one man draw a number, and a patent for the land designated by that number were issued to another man, such patent would be void; and the man who drew the number would be entitled to the land.

Where any officer, or soldier once drew a number, in no event could he, or any one in his name or right, afterwards draw another tract.

Independent of any other evidence, a patent for donation land would be presumptive evidence that the patentee had drawn the number for which such patent had issued to him; although his name did not appear in the comptroller's list, or on the general draft.

But such presumption would not prevail where his name did appear in another number, and a patent had issued to him for that number, and where the number for which his patent issued, without having his name in it, was subsequently drawn from the wheel in the name of another.

WRIT of error to the Court of Common Pleas of Mercer county.

The action was ejectment to recover a tract of donation land, containing two hundred acres, No. 763, in district number 4. The plaintiff made title through *Robert Parker*, a lieutenant in the Pennsylvania line, and exhibited a patent to him for lot No. 763, 4th district, dated the 28th day of February 1794, the general draft of that district, in which his name appeared in that number, and also the comptroller's list, in which No. 763, in the 4th district, is set down opposite to his name as having been drawn by him.

The defendants rested their title on a patent to *Hinderliter*, assignee of *John Whiteman*, for lot No. 763, in the 4th district, (being the same lot,) dated the 12th day of September, 1790. To defeat which, the plaintiff gave in evidence the following extract from the general draft of donation land in district number 9.

No. 1786.

No. 1778.

*John Whitman*, No. 1776.

No. 1775.

No. 1771.

They also gave in evidence a certified extract from the comptroller's list, in which the name of *John Whiteman*, private, was inserted, and opposite to it two hundred acres, No. 1776, 9th

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district, and that this was the only entry on the said list in the name of *John Whiteman*.

They also gave in evidence a patent to *John Whiteman* for lot No. 1776, 9th district, dated 18th April, 1787.

The plaintiffs' counsel requested the court to charge the jury:

"1st. That if the patent for the tract of land in dispute was made and delivered to *Hinderliter*, as assignee of *Whiteman*, it would vest no title in him, unless the number of this tract had been drawn from the wheel previously to either *Whiteman* or *Hinderliter*, and that of this fact the jury must judge from the evidence given on the trial.

"2d. That the patent to *Hinderliter*, which had been given in evidence, unless the name of *Hinderliter* or *Whiteman* was inserted in the general draft, and within the lot, must be postponed to the patent of the plaintiff; if the jury believe the name of *Robert Parker* was inserted in the general draft, and within the lot at the time it was drawn."

The court charged the jury on the first point: that "the granting of the patent is evidence of the drawing of the numbers." And on the second point, that "this omission by the officers of the State, would not vitiate a patent, if otherwise fairly obtained."

Several errors were assigned, which are substantially embraced in the points above stated, and the answers of the court thereto.

*Foster*, of Mercer, for the plaintiff in error, argued,

That there was a difference between a patent granted by the States, and the king of England. The former gives no title, but is *prima facie* evidence of title, the latter vests title until it is vacated. The one can always be contested by any other claimant to the land, the other cannot. 2 *Smith*, 191. He cited the 12th, 13th and 14th section of the act of 1785, 2 *Smith*, in relation to donation lands.

The evidence given, negated the idea of regularity in the first grant.

A patent is only *prima facie* evidence of a regular title. It may be obtained by fraud, or issued by mistake; it is not conclusive. *Benner v. Baker*, 4 *Bin.* 218.

The first patent was issued without observing the requirements of the act of assembly, and must be postponed to the subsequent regular title.

The assignee of a patent is in no better equity than the assignor. *Gonzalus v. Hoover*, 6 *Serg. & Rawle*, 118.

The court did not answer the points fully: they did not tell the jury what the law would be, if the number in the patent had never been drawn. *Vincent v. Huff*, 4 *Serg. & Rawle*, 298. The court took the facts from the jury.

The patent to *Hinderliter* was but *prima facie* evidence of the

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facts recited; and the presumption of regularity is removed by proof that it had not issued according to law.

It is the appropriation of the land by the legislature, and not the patent, which gives the title.

The entry of the name in the general draft is made a record, in lieu of recording the patent.

Of *Hinderliter's* patent there was no notice to *Parker* when he drew, in 1794, this number; and the former is guilty of that sort of laches which should postpone his claim.

*Moore and Ayres*, contra.

The patent is evidence *per se* until invalidated by conflicting evidence. Fraud is not to be presumed.

The patent could not have issued, unless the number which it calls for had been drawn; and so is the charge of the court. And if the number had been drawn, the omission on the part of the officers intrusted with the duty to insert the name in the number in the general draft, and the number opposite to the name on the comptroller's list, would not vitiate the patent. The mistake of the officers could not affect the title, and therefore the first patent must prevail. No fraud was proved, and besides, the finding of the jury proves that *Whitman* and *Whiteman* were different persons.

The law does not say that the connected draft *shall be a record*.

These drawings for donation lands commenced in 1794, and continued until 1804. If the plaintiff's draft had been antecedent to the defendant's patent, there might be some weight in their claim, but we are first in time, and therefore first in right.

The court declined hearing *Banks*, for the plaintiff in error, in reply.

The opinion of the court was delivered by

HUSTON, J.—During the war of the revolution, our legislature promised donations in land to the officers and soldiers of our army; and after the war, measures were taken to survey the lands, and very particular direction given as to the mode of appropriating a tract to each soldier, in such manner that each might have the proper quantity, and no more, and might be able to ascertain with certainty the tract allotted to him. After the lands were all surveyed, and numbered, a general draft or drafts made, in which the number was inserted in each tract, a list of officers and soldiers entitled to lands made, see section 9th of the act of 24th March, 1785, and after every thing was prepared, a number was drawn for each.

The number drawn was put in a column annexed to the list, opposite the name of the person for whom it was drawn, and the name of the person, who drew a particular number, was inserted in that number in the general draft. This general draft was to be kept by the executive council until all applications were satis-

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fied, and then to be deposited in the office of the master of the rolls; *as a public record to serve to all intents and purposes in lieu of recording the patent*: when the persons intrusted, who under the old constitution, were three of the members of the executive council, closed the drawing at any time, the wheels were closed, in their presence, and sealed; and so continued deposited carefully and safely, until further drawing was required. It was then not easy after a name had once drawn a number, to return that number into the wheel. When a name had drawn a particular number, not only was the number set down opposite the name, but also the name was inserted in that number, in the general draft, and a report was made of the name which drew, and of the number drawn to the President, or Vice President, who caused a patent to be made out, &c.

Notwithstanding all these precautions it seems mistake, or fraud has occasioned two patents to issue for the same tract; and we are to decide which is entitled to the land.

The officers intrusted could at no time proceed to give a patent to an applicant, for any tract he might ask. The law was imperative, he must take an equal chance, every one must draw, and he could not have the tract which he wished, or which the officers wished to give him; a patent would be, and is void, unless given after drawing, and for the number drawn. This matter was submitted to the court, and overlooked in the opinion.

What was done in the present case? We have evidence that only one person of the name of *John Whiteman* was in the comptroller's list.

There is evidence that *John Whiteman* drew number 1776, in the 9th district, in the year 1787, and on the 18th of April 1787, a patent issued for this tract, number 1776, in the 9th district, to *John Whiteman*.

Either this patent issued to the same man, (his name being spelled slightly different,) who drew number 1776, or to a different man, if to the same man, he has that tract, and is entitled to no more, and any claim he makes, or which any one under him makes to any other tract, must be a claim founded in dishonesty and fraud. If the patent issued to a man different from him who drew number 1776, that is, if *John Whiteman*, who got the patent, was a different man from him who drew number 1776, then the patent for that number is void, and *John Whiteman* is yet entitled to number 1776, and to a patent for it: but if there is but one *John Whiteman*, and he drew number 1776, in 1787, in no event can he draw another tract afterwards, nor can any one in his name or right obtain a patent for another tract.

It is true, that independent of any other evidence, a patent would be presumptive evidence, that the patentee had drawn the number

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for which a patent issued to him; and we might suppose his name had not been inserted in the list of those who drew, or that the number drawn had through mistake, or neglect, not been set opposite his name; and further, that from another mistake or neglect, his name had not been inserted in the general draft, in the tract which he drew, and it would be a great deal to suppose all this, but here we are asked to do much more; to throw away the evidence that he drew number 1776, and to suppose, without evidence, that his assignee drew number 763, in 1791; and further that after he drew it, and after neglecting to insert his name in that number, in the general draft, and set that number opposite his name in the comptroller's list, we must suppose the officers put number 763 back into the wheel, wickedly and corruptly: for that number was found in the wheel in 1794, when it was drawn out by *Robert Parker*.

I can appreciate the feelings of the judge, and his sympathy for the defendant, who has unfortunately purchased under a *fraudulent* patent, and spent time and labour in improving the land; but a little reflection will show us that he must bear his own loss, or obtain compensation from *Hinderliter*.

It never can be, that the owner of a tract of land must lose it, because a title to it has been forged, and by that forgery an innocent person has been imposed on. If any person is to apply to the State for redress, it must be the defendant.

The officers of the State have done an act which has injured him. The plaintiff's right is regular and complete; and courts and juries will see that such a right is not to be given away from pity.

Judgment reversed, and a *venire facias de novo* awarded.



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# INDEX

## TO THE PRINCIPAL MATTERS.

### ABANDONMENT.

See LAND AND LAND OFFICE, 4.

### ACCOUNT RENDER.

1. The judgment of *quod computet*, in an action of account render is interlocutory, upon which a writ of error will not lie. *Beiler v. Zeigler*, 135.

### ACTIONS IN GENERAL.

See PLEADING. INSOLVENT, 1. MALICIOUS PROSECUTION, 1, 2.

### ACTION ON THE CASE.

See MALICIOUS PROSECUTION, 1, 2.

### ACT OF ASSEMBLY.

See QUARTER SESSIONS, 1.

### ADMINISTRATOR.

See EXECUTORS AND ADMINISTRATORS.

### AGENT and FACTOR.

See EVIDENCE, 28. WITNESS, 2.

1. An agent thus proved his own authority, "I never executed any other deed of defeasance than the one in question. I frequently wrote letters, signed receipts, and other papers of consequence for him, (the principal,) by which he at all times considered himself bound. I kept all his books of accounts for upwards of thirty years; never had a written power of attorney." *Held*: That deed of defeasance, executed by such an attorney, in the name of his principal, is not evidence to convert an absolute deed to the principal into a mortgage.—*Gratz v. Philips*, 333.

### APPEAL.

See COSTS, 2, 6.

### APPLICATION.

See LANDS AND LAND OFFICE, 4, 5.

### APPURTENANT.

See SHERIFF SALE.

### ARBITRAMENT and AWARD.

See BAIL. COSTS, 2, 6.

1. Where the issue joined was on the plea of a submission and an award, and the

submission was general "of and concerning the differences depending between" the parties; an award setting forth that the arbitrators had examined *their several books of account*, and taken into consideration a judgment bond to the plaintiff from the defendant, and finding a particular sum due to the former on that bond, without determining how much, or whether any thing was due on the other subjects of difference submitted to, or examined by them, is not final, and therefore it is bad.—*Johnston v. Brackbill*, 364.

2. Where issue is joined on this plea, evidence of mistake and inadvertance in the arbitrators in making the award is inadmissible. But where such evidence is received under this plea, and the award is a nullity, the court will not reverse for the admission of such evidence.—*Ibid*.

### ASSIGNEE.

See BILLS OF EXCHANGE and PROMISSORY NOTES, 1. BOND, 1, 2, 3.

1. An assignee of bonds, which are secured by a mortgage, is entitled to all the security which the mortgage affords, although he did not know of its existence when he took an assignment of the bonds.—*Betz v. Heebner*, 280.
2. An assignment of the mortgage deed, to one who holds part of the bonds, gives him no preference over the other bond holders, in the distribution of the proceeds of sale of the mortgaged premises.—*Ibid*.

### ASSIGNMENT.

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### ASSUMPSIT.

See CONSIDERATION, 1. GUARDIAN and WARD, 5. LIMITATIONS 9.

### ATTACHMENT DOMESTIC.

See PLEADING, 15.

### ATTACHMENT FOREIGN.

1. A debt due to one, who is an applicant for the insolvent laws of Maryland, and for whom a provisional trustee has been there appointed, is not subject to a fo-

reign attachment in Pennsylvania, it being in *gremio legis*.—*Mullikin v. Anglinbaugh*, 117.

2. A foreign attachment will lie in Pennsylvania, at the suit of a citizen of another State.—*Ibid*.

3. *Quere*—Whether a foreign attachment abates by the death of the defendant, after interlocutory and before final judgment.—*Ibid*.

### ATTORNEY.

See ERROR, 1, 19. JUDGMENT, 4. SHERIFF SALE, 10.

1. Where judgment in ejectment was entered by agreement of the parties, to be released on the payment of a certain sum, on or before a certain day, and the money is not paid on or before the day, the judgment becomes absolute, and the receipt of the money by the attorney of the plaintiff, after the day, without his knowledge will not deprive him of his right to the land.—*Gable v. Hain*, 265.

### AWARD.

See ARBITRAMENT AND AWARD.

### BAIL.

See MALICIOUS PROSECUTION, 1, 2. PRINCIPAL AND SURETY 2. RECOGNIZANCE 2.

1. The bail on an appeal from the award of arbitrators, under the compulsory arbitration act, is not subject to the practice in reference to special bail. Where the appellee is dissatisfied with the bail, his course is to apply to the court for a rule for additional bail, and the opinion of the court that the bail is sufficient, is conclusive; he cannot treat it as a nullity, and issue execution.—*Snyder v. Zimmerman*, 293.

2. Bail may be dispensed with altogether, and by suffering a term to pass without objection on the part of the appellee, it is dispensed with.—*Ibid*.

### BARGAIN and SALE.

See DEED. FRAUDS and PERJURIES.

1. Where no consideration is expressed in a deed of bargain and sale, parol evidence may be given to show that a consideration did pass from the grantee to the grantor.—*White v. Weeks*, 486.

### BILLS OF EXCHANGE and PROMISSORY NOTES.

1. If the payor of a note stands by and sees it assigned to a third person, without giving the assignee notice of an existing defence, he shall afterwards pay the amount of the note to the assignee, although the consideration thereof should have entirely failed; and whether his conduct proceeded from ignorance or design.—*Decker v. Eisenauer*, 476.

### BOND.

See ASSIGNEE. EQUITY, 1. JUDGMENT &

1. If one who is about to receive the assignment of a single bill, call upon the payor to know whether he will pay the money, and is informed by him that he will, he cannot afterwards set up any defence against the payment of the money to the assignee, which existed previous to such declaration.—*Elliott v. Callan*, 24.

2. One about to take an assignment of a bond, is bound to enquire into every circumstance that might be set up against payment of any part of the debt, and having failed to do so, he stands exactly in the place of the obligee.—*Frantz v. Brown*, 257.

3. It is competent therefore, for an obligor to set up as a defence to the payment of his bond in the hands of an assignee, a parol agreement between him and the obligee, made after the bond was executed, but before it was assigned, that in a certain event, which might and did happen after the assignment, the bond was not to be paid.—*Ibid*.

### CANALS.

See PRACTICE, 8. QUARTER SESSIONS, 1. ROADS and BRIDGES.

1. An application by the owners of property, under the act of 9th April, 1827, for damages done by the location and construction of the Pennsylvania canal is premature, if made after the completion of the canal upon the land of the petitioner, but before the completion of that division of the canal upon which such lands are located.—*Commonwealth v. Fisher*, 462.

2. The acts of the 25th February, 1826, and 9th April, 1827, on this subject, are to be construed in connection with each other, and by such construction it is necessary that the viewers appointed to assess the damage done to the land of an individual, should, in their report, state the courses, distances, and quantity, with such references as will designate the exact property converted to the use of the State.—*Ibid*.

3. The sixth section of the act of 10th April, 1826, gave authority to the commissioners, to take releases to the commonwealth from individuals, through whose lands the canal might be thereafter located.—*Ibid*.

4. The consideration of such releases, so taken, has not failed, because the eastern and western waters have not been united by that route of the canal along which the releasors live. The consideration is, that the canal shall pass through the land of the releasor.—*Ibid*.

CIRCUIT COURT.

1. A writ of error will not lie to remove a judgment in the Circuit Court to the Supreme Court, in any case in which the party might have had a remedy by appeal. — *Elliott v. Sanderson*, 74.
2. In case of appeal from a decree of the Circuit Court, a *certiorari* is not necessary, nor can the prothonotary demand his fee before entering it. — *Konigsmacher v. Kimmel*, 907.
3. The return days of process into the Circuit Court from the Common Pleas, Quarter Sessions or Orphans' Court, by act of Assembly, are the third Monday in *March*, the first Monday in *September*, and the second Monday in *December* in each year. — A *certiorari* is not necessary to remove a record on appeal from the Orphans' Court to the Circuit Court. — *Feathers' Appeal*, 322.
4. Where an appeal is taken from the Orphans' Court to the Circuit Court, the appeal is not required to be filed before the next return day after it is taken, nor can any rule be taken in the case until then: but if the record be filed before the return day, and the cause is heard and decided by the Circuit Court without objection, it is too late to take that objection in the Supreme Court, after the cause is brought there upon appeal by a motion to quash. — *Ibid.*
5. The Circuit Court has no appellate jurisdiction of proceedings in the Quarter Sessions, when not according to the course of the common law: hence it has not jurisdiction of a proceeding against a husband for deserting his wife and children. — *M'Kee's Case*, 449.
6. The Circuit Court may remove a cause by *habeas corpus*, with a view to the trial of an issue, but it can only do so when the issue is according to the course of the common law. — *Ibid.*

CONDITION.

See JUDGMENT, 8. RECOGNIZANCE, 3.

CONSIDERATION.

See CANALS, 4. BARGAIN and SALE, 31.

1. An agreement to forbear to sue for a reasonable time, is a consideration certain enough, upon which to sustain an action. — *Sidwell v. Evans*, 383.

CONSTABLE.

1. A Justice of the Peace has power to supersede an execution issued by him: and such supersedeas will exonerate the constable from liability. — *Shuman v. Pfoutz*, 61.

CONTRACT.

See CONSIDERATION 1. FOREIGN LAWS and JUDGMENTS, 1.

CORPORATION.

1. A charter of incorporation cannot be declared void in a collateral suit, it can only

be vacated by a *scire facias* to repeal it; or on a writ of *quo warranto*, at the suit of the commonwealth. — *M'Conahy v. The Centre and Kishacoquillas Turnpike Road Co.* 426.

2. An agreement between commissioners authorised to take subscriptions of stock, that a certain number of shares of fictitious stock shall be subscribed, in order to enable them to obtain a charter, is a fraud upon the *bona fide* subscribers, which will relieve them from any obligation to pay. — *Ibid.*
3. A declaration made by a third person, in the presence of the commissioner to one about to subscribe for stock, that he can pay his subscription in work, and this is not objected to at the time by the commissioner, must be taken as his declaration; and there is no distinction between the commissioner and the corporation, in regard to this promise. — *Ibid.*

COSTS and FEES.

See ERROR, 4. CIRCUIT COURT, 2. PRACTICE, 5, 6.

1. A. brings an action of assumpsit before a Justice of the peace against B. and recovers a judgment for a certain sum, from which B. appeals: the cause being afterwards tried in the Common Pleas, a verdict and judgment was rendered in favour of A. for the same sum: *Held*, that A. was entitled to recover his costs since the appeal. — *Johnston v. Perkins*, 23.
2. Where the defendant, under the act of the 20th of March, 1810, regulating arbitrations, appeals from the award of arbitrators, and a general verdict passes for him, he is entitled to the costs which follow a final judgment: such case is not within the provisions of that act, as to costs, and they are given by the law as it existed before the passage of that act. — *Gallatin v. Cornman*, 115.
3. Where a transcript of the judgment of a justice of the peace is filed in the office of the Prothonotary of the Court of Common Pleas, and the judgment is opened, and the defendant let into a defence in that court, and a verdict is rendered for the defendant, the one hundred dollar act, regulating the payment of costs on appeal from the judgment of a justice, does not apply. — *Ibid.*
4. Costs are not recoverable by either party in an action of partition. — *Stewart v. Baldwin*, 461.
5. Costs are exclusively a matter of statutory creation. — *Ibid.*
6. A judgment was rendered by a Justice of the Peace for the plaintiff, the defendant appealed to the Common Pleas, he afterwards appealed from an award of arbitrators against him, and paid the costs. Upon a trial of the cause by a jury, the defendant gave evidence which had not been given to the justice nor to the arbitrators, and a general verdict was



rendered in his favour: *Held*, That he was entitled to recover from the plaintiff the costs which he had paid upon the appeal.—*Horniter v. Brown*, 488.

### COURTS.

See ERROR, 14, 18. EVIDENCE, 19. FOREIGN LAWS and JUDGMENTS, 1.

### DAMAGES.

See QUARTER SESSIONS, 1.

### DEBTOR and CREDITOR.

1. A creditor who has obtained judgment against the principal, against the indorsers, and against the absolute bail of the principal, and has issued execution and levied upon the land of the principal or of the absolute bail, may, nevertheless have execution of the chattels of the endorsers. Nothing but actual satisfaction can prevent him.—*Gro v. The Huntington Bank*, 425.

### DEED.

See AGENT and FACTOR, 1. BARGAIN and SALE, 1. EVIDENCE, 90. FRAUDS and PERJURIES, 2, 3.

1. A delivery is essential to the proper and legal execution of a deed, and that delivery may be to the party, to one authorized by the party to receive it, or to a stranger for the use of the party; but the placing a deed on record by the grantor, is not an absolute delivery, but only evidence of it, of which the jury may judge.—*Cheas v. Cheas*, 32.
2. The date of a deed is *prima facie* evidence of the time of its delivery, but it is not conclusive.—*Hall v. Benner*, 402.

### DEVISE.

See WILL.

### DIRECT TAX.

See TAXES.

### DONATION LAND.

See LANDS and LAND OFFICE.

### EJECTMENT.

See EVIDENCE, 1. LANDLORD and TENANT, 1, 2. PLEADING, 2.

1. An ejectment may, in some cases be supported on a warrant without a survey.—*Smay v. Smith's Ex'rs*, 1.
2. An entry is not necessary in any case in Pennsylvania, in order to enable the person who has title, to recover the possession of lands.—*Carlisle v. Stittler*, 6.
3. When a judgment in ejectment was entered by agreement of the parties, to be released on the payment of a certain sum, on or before a certain day, time is of the essence of the contract: and if the money be not paid on or before the day, the judgment becomes absolute and indefeasible.—*Gable v. Hain*, 265.

4. The receipt of the money, by the attorney of the plaintiff, after the day stipulated for payment, without the knowledge of his client, will not prevent the plaintiff from pursuing his judgment to execution, and obtaining the possession of the land.—*Ibid*.

### EQUITY.

See ASSIGNEE, 1, 2. BOND, 1, 2, 3. EXTINGUISHMENT and SATISFACTION, 3. VENDOR and VENDEE, 1.

1. In a case where chancery would enjoin an obligee in a bond or his assignee from proceeding at law, while the obligor remains a loser or in jeopardy as a surety, evidence is admissible to enable the jury to produce the same result by means of a conditional verdict.—*Franz v. Brown*, 257.
2. A. being the owner of a tract of unimproved land, sells one hundred acres to B. and one hundred acres to C.; B. and C. go upon the ground and mark a division line between them; it was afterwards discovered that A. had no title to the land: B. then went upon it, had a survey made of four hundred acres, including the one hundred acres sold to C. and acquired title by actual settlement: *Held*, That there was not such a privity of estate or title between B. and C. as to prevent B. from thus acquiring for himself, a title to the whole of the land.—*Smiley v. Dixon*, 439.

### ERROR.

See ARBITRAMENT and AWARD, 2. EVIDENCE, 17. PLEADING, 10, 17. PRACTICE, 1, 7.

1. The prothonotary of the Court of Common Pleas, has no power to administer the oath required to obtain a writ of error.—*Pumroy v. Lewis*, 14.
2. In a case which originated before a Justice of the Peace, from whose judgment there was an appeal to the Common Pleas, where a verdict and judgment was rendered for a sum exceeding the jurisdiction of the justice, this court affirmed the judgment upon the plaintiff's releasing the excess.—*Darrah v. Warnock*, 21.
3. An execution issued upon a judgment out of the Court of Common Pleas, is not removed into this Court, unless specifically mentioned in the precept and writ of error.—*Shuman v. Pfoutz*, 61.
4. This Court will not hear the first allegation of error, in the taxation of a bill of costs; the motion to correct the error must be first made in the court below.—*Ibid*.
5. A writ of error will not lie upon an order of the Court of Common Pleas overruling a motion to strike off an appeal, and setting aside an execution, sup-

- posed to have been impropvidently issued.—*Gardner v. Espy's Adm'r*, 73.
6. A writ of error will not lie to remove a judgment in the Circuit Court to the Supreme Court, in any case in which the party might have had a remedy by appeal.—*Elliott v. Sanderson*, 74.
  7. A writ of error will not lie to the opinion of the Court of Common Pleas, discharging a person, on a writ of *habeas corpus*, from servitude.—*Russell v. Commonwealth*, 82.
  8. A party who has recovered a judgment in the Court of Common Pleas, and received the amount of it from the defendant, will not be permitted to reverse that judgment on a writ of error.—*Laughlin v. Laughlin's Adm'r*, 114.
  9. *Quere*.—If a plaintiff in error withdraws his writ, and has an entry made upon the docket, "writ of error withdrawn," whether it is not a retraxit, and will not bar another writ.—*Ibid*.
  10. Error does not lie upon a judgment *quod computet* in account render.—*Beitler v. Zeigler*, 135.
  11. In an action by *Campbell's Executors v. Colhoun's Administrators*, for contribution on account of purchase money and interest paid by the former on a joint contract, the court below charged the jury, that if the contract were not rescinded between *Campbell* and *Colhoun*, the former could recover for interest paid. The jury found a *general verdict for defendants*: Held, That it appeared that the jury went on a distinct ground of fact, "the rescission of the contract," and if error had been committed in the charge as to the principle, this court would not reverse on that ground, as it was without prejudice to the party.—*Campbell's Ex'rs v. Colhoun's Adm'r*, 140.
  12. When the Court of Common Pleas, erroneously permit evidence to be given to the jury, no such evidence being afterwards given, this court will not reverse the judgment.—*Bank of Pennsylvania v. Jacobs' Adm'rs*, 161.
  13. Where it appears, by a calculation, that the jury did not allow credits, of which incompetent evidence was given; the judgment will not be reversed on a bill of exception to such evidence.—*Johnston v. Brackbill*, 364.
  14. A judge cannot be required to give a legal construction to the words of a witness, and to say whether in point of law they sustain the allegation in point of fact.—*Sidwell v. Evans*, 383.
  15. A certified copy of a docket entry of a suit cannot be received to establish the existence of a former suit pending for the same cause; and if received, the error will not be cured by the instruction of the court in their charge to the jury, to disregard it.—*Ingham v. Mason*, 389.

16. An order of court making an assignment of a judgment to a surety, may be reviewed in error.—*Burns v. Huntingdon Bank*, 395.
17. It is error to submit a question of law to the jury.—*Commonwealth v. Henderson*, 401.
18. If the court should decide from inspection of the papers, that a water-right and tilt hammer would pass by a sheriff sale as an appurtenant, it would be error; it is a question of fact for the jury.—*Hall v. Benner*, 402.
19. The oath upon which to ground a writ of error, must be made by the party, and it is not sufficient if made by the attorney.—*Bryan v. McCulloch*, 421.

# ESTATE.

See WILL, 2.

# ESTOPPEL.

See LANDLORD and TENANT, 1, 2. PLEADING, 2, 3, 4. SHERIFF'S DEED, 1.

# EVIDENCE.

See AGENT and FACTOR, 1. ARBITRAMENT and AWARD, 2. EQUITY, 1. ERROR, 12, 13, 14. HUSBAND and WIFE, 1. INSOLVENT, 3. LANDS and LAND OFFICE, 9, 15, 16. LEGACY, 4. MALICIOUS PROSECUTION, 1, 2. OFFICE and OFFICER, 1. PARENT and CHILD, 1. PLEADING, 14. PRACTICE, 6. PRESCRIPTION and PRESUMPTION, 2. PROTHONOTARIES and CLERKS of COURTS, 1. SURVEYOR, 1. WITNESS, 1, 2.

1. In ejectment to recover a tract of land, where reference is made in a deposition to lines run and surveys made, and a draft is annexed, which does not embrace all those lines and surveys, but only those of the tract in dispute, a will be sufficient, if the defendant was present to cross-examine, and did not ask for any other or further draft.—*Smay v. Smith's Ex'rs*, 1.
2. Declarations of a grantor made subsequently to the execution of a deed, cannot be given in evidence to invalidate that deed.—*Chess v. Chess*, 32.
3. But when the question to be determined by the jury is whether the grantor was sane or insane, at and about the time the deed was executed, it is competent to give evidence of his declarations made soon after the execution of the deed, for the purpose of proving imbecility of mind.—*Ibid*.
4. A man's neighbourhood is co-extensive with his intercourse among his fellow citizens. One witness, therefore, testified that he knew the general character of another witness, whose character was in issue, but he did not know his character in his immediate neighbourhood. It

- is competent to ask the witness whether he would believe him on his oath.—*Ibid.*
5. The account of a public officer, settled by the Auditor General, and approved by the State Treasurer, and duly certified by the Auditor General, to be a true copy from the records of his office, is, *prima facie*, sufficient evidence to enable the commonwealth to recover the balance due by such officer, in a suit brought on his official bond against his surety.—*Commonwealth v. Farrelly's Administrators*, 52.
  6. *Campbell*, in 1805, bought of *W.* 5000 acres of land, at four dollars per acre. The purchase was at a credit of eight years, with interest at three per cent. after which the principal was to be paid at three, six and nine years, reserving six per cent. on unpaid balances. By settlement made in 1819, *Campbell* had paid the interest to *W.* up to that time, and four thousand four hundred and twenty-nine dollars and forty-two cents, on account of principal. In an action of assumpsit, brought in 1827, after *Campbell's* death, against the administrators of *Colhoun*, for money so paid to *W.* in which the evidence to charge the defendants consisted of a series of letters written by *Colhoun* to *Campbell*, from 1805 to 1814, from which it appeared that *Colhoun* had been let into a participation in *Campbell's* purchase: *Held*, that six letters from *Campbell* to *Colhoun*, in a period of as many years, from 1814 to 1820, in which there was no allusion to the subject, were evidence of the recession of the agreement between *Campbell* and *Colhoun*.—*Campbell's Executors v. Colhoun's Admrs*, 140.
  7. Upon the allegation of forgery, it is not necessary to produce, as witnesses, all the persons in whose possession the forged paper had been, in order to identify it—its identity is a matter of fact for the jury.—*Bank of Pennsylvania v. Jacobs' Admrs*, 161.
  8. A comparison of hand-writing is admissible in evidence in civil cases in corroboration of a belief of a witness founded upon actual knowledge.—*Ibid.*
  9. The testimony of an *expert*, who speaks alone from his knowledge and skill in hand-writing, is not competent to establish a forgery.—*Ibid.*
  10. A witness is incompetent to prove a signature, without proof of having seen the person write, or of other circumstances to show knowledge of the hand-writing which he is called to prove.—*Boyd's Admrs v. Wilson*, 216.
  11. It is not enough, without such preliminary proof, that the witness swears that the signature offered is the signature of the person whose it purports to be.—*Ibid.*
  12. Trustee for the payment of debts, paid a judgment against the debtor, and took an assignment in writing on the back of the bond on which it was entered, expressed to be for value received: *Held*, that it was competent to prove by parol, that the assignment had been made to enable the trustee to enter satisfaction on it, and not to preserve it as a subsisting debt.—*Keller v. Leib*, 220.
  13. If evidence must be immaterial when given, the court ought to reject it.—*Ibid.*
  14. Where the plaintiff interrogated defendant's witness as to a conversation which had taken place between him and a certain *W. B.*; and the witness stated the conversation, by which it appeared that he had not told *W. B.* all that he related in court, and the plaintiff then asked him, "why did you not tell the whole truth to *W. B.*?" and the witness replied, "I kept it back because I was living in the plaintiff's house, as tenant, and if I had told it, he would have thrown me out neck and heels, he would have knocked my brains out; as soon as he did know it, he took out a landlord's warrant," and the plaintiff then called *W. B.* and by him gave evidence to contradict the statement made of the conversation: *Held*, that it was competent to the defendant to give evidence, that the plaintiff was a quarrelsome and dangerous man to those he had a prejudice against.—*McKim v. Somers*, 297.
  15. When a party has an opportunity of being present at the taking of a deposition, and does not choose to avail himself of it, he shall not afterwards be permitted to except to a leading question and answer in such deposition, or to make formal objections against it. When a party attends, and objects to the form of the question, then if the opposite party persists, he does it at his peril.—*Ibid.*
  16. A deposition taken in the Register's Court, upon hearing of any cause litigated in that court, but not decided, is not evidence upon the trial of an issue between the same parties, directed by that court, without proof that the deponent is dead, out of the jurisdiction of the court, or unable to attend.—*Detrich v. Detrich*, 306.
  17. *Query*. Whether the decision of the trying court upon the preliminary proof of the inability of the witness to attend is the subject of error?—*Ibid.*
  18. *Query*. Upon an issue *deviseavit vel non*, are the declarations of a devisee, who is a party to the issue, evidence, where there are other devisees or legatees not parties?—*Ibid.*
  19. The construction of written evidence is for the court, and of parol evidence for the jury; and an admixture of parol with written evidence draws the whole to the jury.—*Sidwell v. Evans*, 383,

20. It is competent to give evidence of what was said previously to the execution of a deed, in order to establish the fact that the grantee received the deed in trust for another.—*Hugham v. Muson*, 389.
21. A certified copy of the docket entry of a suit cannot be received to establish the existence of a former suit pending for the same cause; and if received, the error will not be cured by the instruction of the court in their charge to the jury to disregard it.—*Ibid*.
22. The date of a deed is *prima facie* evidence of the time of its delivery, but it is not conclusive.—*Hall v. Berner*, 402.
23. The recital in a sheriff's deed that the sale was made on a certain day, does not estop the grantee from showing by parol that it was made on a prior day.—*Ibid*.
24. A witness who swore before arbitrators, that from an entry in his book, which he had then before him, he knew an occurrence had taken place on a certain day, having died before the trial of the cause in court, it is competent to prove what he swore before the arbitrators, without the production of the book.—*Cox v. Norton*, 412.
25. The fact of a paper having been given in evidence before arbitrators without objection, is no reason why it should be received upon the trial of the cause in court, if it is otherwise illegal.—*Ibid*.
26. If a grantor make a deed with general warranty, he cannot show by parol that an agreement was made a few days before, that the grantee was to patent the land.—*McKenna v. Doughman*, 417.
27. Satisfactory proof of the loss of a written advertisement must be given to lay a ground for the admission of the advertisement copied into the newspaper.—*McConahy v. The Centre and Kishacoquillas Turnpike Road Co*, 426.
28. A power of attorney, executed by an administrator, who does not therein style himself as such, by virtue of which a dispute is settled between his intestate and a third person, by the attorney-in-fact, is competent evidence to go to the jury, with the settlement and release, particularly if it did not appear that the administrator had any account in his own right to settle.—*Irwin's Adm'r v. Allen*, 444.
29. It is a fatal objection to a deposition taken to be read in evidence in a cause, that it is in the hand-writing of an attorney concerned in the cause, or specially employed by the party for that purpose, unless the opposite party, or his attorney, be present and consent thereto.—*Addleman v. Masterson*, 454.
30. Where a plaintiff and defendant reside in the same town, a copy of a notice to take depositions left at the house of the defendant, with the defendant's daughter, by the plaintiff, more than ten days be-

fore the day appointed for taking the depositions, is not a sufficient service of notice.—*Lemon v. Bishop*, 485.

31. Where no consideration is expressed in a deed of bargain and sale, parol evidence may be given to show that a consideration did pass from the grantee to the grantor.—*White v. Weeks*, 486.
32. It is competent to prove that the words "proceedings stayed by plaintiff's attorney," which had been endorsed on a writ of *liberari facias*, and signed by the sheriff and which were struck out or erased by a line run through them, though still legible, were his return to that writ, and that he had not struck them out.—*Meredith v. Shewall*, 495.
33. It is competent to prove, and that by the sheriff, that upon such writ of *liberari facias*, he did not deliver the land to the plaintiff, although it was set forth in the inquisition returned with the writ, that the sheriff and inquest had caused to be delivered the property extended, "until the debt and damages in the same writ mentioned, together with interest, &c. be fully levied."—*Ibid*.

## EXECUTION.

See DEBTOR and CREDITOR, 1. JUDGMENT, 10. PRACTICE, 7.

1. The bare seizing of land in execution to the value of the debt, is not a satisfaction.—*Gro v. The Huntingdon Bank*, 425.
2. An inquest under a *liberari facias* can only determine the value of the land, the yearly rents and profits, and the term during which it shall be extended. The delivery of the land is the executive duty of the sheriff alone.—*Meredith v. Shewall*, 495.

## EXECUTORS AND ADMINISTRATORS.

See EVIDENCE, 28. TESTATE and DECEASED, 4, 6. PLEADING, 1, 8, 9, 10. PRESCRIPTION and PRESUMPTION, 2.

1. Where personal estate is appraised, and a part taken by the heirs at the appraisement, and a part sold at an advance upon the sum at which it was appraised, the administrator will not be charged with a proportional advance on the goods retained; without any evidence that the goods retained were of greater value than their appraised price.—*King v. Morrison's Adm'r*, 138.
2. Query.—Under what circumstances should an administrator be charged with an advance on goods so taken?—*Ibid*.
3. J. M. died in 1810, having in his possession a bond on his brother D., given in 1794, which came to the hands of the administrator, who with D. in 1811, although the cause of action exceeded \$100, entered before a justice of the peace an amicable action, and referred all matters

in variance to referees, who reported in favour of D.; from this the administrator appealed. In 1814, the Supreme Court decided, that a justice had not jurisdiction by amicable action, and reference, where the cause of action exceeded \$100. This decision was published in 1818; the appeal was then quashed: D. obtained judgment by *scire facias*, reviving the original judgment in his favor before the justice. To this the administrator issued a *certiorari*, reversed the judgment for want of jurisdiction in the justice, and to the next term, in 1820, brought suit on the bond, and recovered judgment.—*Ibid.*

D., who in 1820, was solvent, when judgment was rendered against him, had become insolvent, and the debt was lost. By referring to the record of the proceeding in court, it appeared the administrator had eminent counsel.

*Held*—That although the proceeding before the justice had been a mistake, the administrator was not liable for the debt which had been lost.—*Ibid.*

4. J. M. left a slave of advanced age, who by the advice of appraisers, and the family, was not appraised, and lived with the family till they separated, and with the widow until her death, and since that lived with the administrator. At the time of the account taken, 1827, she was of no value, and the administrator agreed to keep her during her life: *Held*, That under the circumstances of the case, the administrator was not chargeable with the value of her services.—*Ibid.*

5. If executor or administrator sells goods of testator or intestate, and do not take security for the price, he is generally charged with the amount. If the bail or security, is a man generally reputed good for so much, it is sufficient, it is not necessary that he should be a freeholder.—*Konigsmacher v. Kimmel*, 207.

6. A wife executrix, whether so constituted before or after her marriage, may be sued with the other executors; or if sole executrix, with her husband; and in either case, after judgment against her as executrix, may have a *devastavit* fixed on her and her estate, and her personal or real estate sold for it.—*Gratz v. Philips*, 333.

7. Executors who were authorized to sell the real estate of their testator, for the payment of certain legacies, sold the same, and afterwards settled their account in the Orphans' Court, by which it appeared there were assets to pay the legacies: the legatees afterwards filed refunding bonds, and brought suits against them as executors, and obtained judgments: *Held*, That such judgments are not liens on the real estate of the executor.—*Mc Culloch v. Stample's Ex'rs*, 422.

## EXTINGUISHMENT and SATISFACTION.

See DEBTOR and CREDITOR, 1.

1. A. & Co. and B. & Co. contracted jointly to purchase from C. a quantity of wheat, for which they were to give the notes of certain banks, which were specified. A part of the wheat was delivered to A. & Co. and a part to B. & Co. without the knowledge of C. for which their respective receipts were taken. Afterwards A. & Co. gave drafts on E. at forty-five days, for the grain received by them: which the receipt stated would be considered as so much money, when paid. B. & Co. also gave their draft at forty-five days on F. for the wheat they had received, in the acknowledgment of which it was set out, "that when paid it would be in full." On receiving these drafts, C. gave up the receipts which A. & Co. and B. & Co. had given for the grain: *Held*, That by the acceptance of these drafts, the joint contract of the partner firms, was not merged in their separate responsibility.—*Tyson v. Pollock*, 375.

2. The bare seizing land in execution to the value of the debt, is not a satisfaction.—*Gro. v. The Huntingdon Bank*, 245.

3. A. C. sells, by articles of agreement to J. M. a tract of land, for which he is to execute a conveyance upon the payment of the purchase money, for which he takes a judgment bond from J. M. Subsequently B. C. enters the judgment bond, issues a *fi. fa.*, levies upon the land, which is afterwards sold by the sheriff, and B. C. becomes the purchaser, for a sum less than one half of the judgment: *Held*, That such sale and purchase is an equitable extinguishment of the whole amount of the judgment.—*Chew's Ex'r v. Mather's Adm'r*.

4. H. S. conveyed a house and lot to D. L., in consideration whereof, D. L. executed eight single bills of fifty dollars each to B. T. and eight to J. K. in which B. T. was his security. D. L. and B. T. entered into an agreement by which the deed from H. S. was to remain in the hands of B. T. as a security for the payment of the eight notes due to him, and the eight notes due to J. K. in which B. T. was security. B. T. afterwards, and before the payment of the said notes, died, having first made a will by which he devised to the wife of D. L. the aforesaid house and lot: *Held*, That such devise released D. L. from the payment of the eight single bills to B. T. but did not release him from the payment of the eight single bills to J. K. in which B. T. was security.—*Lemon v. Thompson's Adm'r*, 482.

**FRAUD.**

See CORPORATION, 2.

1. A deed procured by actual fraud, is void, and cannot be confirmed by subsequent acts or declarations of the grantor.—*Chess v. Chess*, 32.
2. A mortgage of personal property, without a delivery of possession, or the other *indicia* of ownership, is fraudulent as to creditors: and upon the death of the mortgagor, the mortgagee is not entitled to a preference over the other creditors, to have his debt paid first out of the proceeds of the mortgaged property.—*Wich v. Heyden's Ex'r*, 57.

**FRAUDS and PERJURIES.**

See BARGAIN and SALE, 1.

1. A parol gift of a lot of ground by a father to his married daughter, accompanied by possession and valuable improvements made by the husband at his own expense, vests in him no estate in addition to the freehold which the law allows him in right of his wife.—*Ingham v. Mason*, 389.
2. All agreements for the sale and purchase of land, are consummated and extinguished by the deed.—*McKennon v. Doughman*, 417.
3. If therefore the grantor makes a deed to the grantee, which contains a general warranty of title, he cannot afterwards show by parol, that an agreement was made a few days before, that the grantee was to patent the land.—*Ibid.*

**FOREIGN LAWS and JUDGMENTS.**

See ATTACHMENT FOREIGN.

1. Municipal law is a matter of compact, and as such the construction of foreign statutes, as in the case of any other written compact, belongs to the court; and there is no distinction in this respect, between the written and unwritten law.—*Sidwell v. Evans*, 383.

**FORGERY.**

See EVIDENCE, 7, 9.

**GRAIN IN THE GROUND.**

See VENDOR and VENDEE, 2.

**GUARDIAN and WARD.**

See ORPHANS' COURT, 1.

1. B. K., in 1815, was appointed guardian of J.; shortly after, J. W., brother-in-law of J., and administrator of the estate of his father, settled his administration account, by which a balance was found in his hands. In 1816, B. K. received part of that balance in cash, and for the residue coming to his ward, took J. W.'s bond without security. At that time, J. W. was in good circumstances, he kept a store, and up to the year 1820, continued to have a large amount of real and personal property in his possession;

then he sold a tract of land which he had bought at a very high price, at a loss of about \$12,000, and shortly after made an assignment for the benefit of his creditors, by which it appeared that he was largely indebted. The assignees paid fifty-five per cent of his debts. Up to the spring of 1820, many of his neighbours, and among them the mother and another brother-in-law of J., loaned him different sums of money: *Held*, That B. K., the guardian, was not chargeable with the loss upon the bond he had taken of J. W.—*Königsmacher v. Kimmel*, 207.

2. More ought not to be expected from guardians, than common prudential care; they should not be made liable, unless under unfavourable circumstances, their acts expose them to the animadversion of the law, for supine negligence, shewing carelessness of duty, and of the ward's interest: or where the loss is occasioned by their own act, in giving credit, without taking security.—*Ibid.*
3. So if a guardian has in his hands money of his ward, and puts it out, he will generally be liable, unless he take surety in the note, &c. not so if he take a mortgage on land, and an old title, unknown at the time, should sweep away the property mortgaged.—*Ibid.*
4. But where the fund never actually came to the hands of the guardian, there is a difference; he is not bound instantly to sue in all directions, if to all appearance, the money is safe.—*Ibid.*
5. Previously to the settlement of an account in the Orphan's Court, an action of *assumpsit* will not lie by the ward against his guardian, to compel such settlement and payment of the balance.—*Bowman v. Herr's Ex'rs*, 282.
6. A settlement made by the guardian once in every three years in pursuance of the 3d section of the act of the 31st March, 1821, is not conclusive upon the ward, but may be impeached upon the final settlement of the account when the ward arrives at full age.—*Ibid.*
7. Upon the death of a guardian before the settlement of his account, his representatives may be cited and compelled to settle it.—*Ibid.*

**HAIBEAS CORPUS.**

See ERROR, 7.

**HIGHWAY.**

See ROADS and BRIDGES.

**HUSBAND and WIFE.**

See EXECUTORS and ADMINISTRATORS, 6. EXTINGUISHMENT and SATISFACTION, 4. FRAUDS and PERJURIES, 1. INTTESTATE and DECEDENT, 5. LIMITATIONS, 4. PARENT and CHILD, 2.

1. Wherever a husband and wife can sue or be sued by adversary process, an ami-

- cable action can be entered, and she and her rights are as much bound as if the proceeding had been adversary.—*Gratz v. Philips*, 333.
2. An assignment by a husband, under the insolvent laws, of his wife's choses in action, defeats her right of survivorship, in case he dies before they are reduced into possession.—*Richwine v. Heim*, 373.
  3. For civil purposes, reputation and cohabitation are sufficient evidence of marriage.—*Senser v. Bower*, 450.

### INCUMBRANCE.

See VENDOR and VENDEE.

### INFANT.

See PARENT and CHILD.

### INQUISITION.

See EXECUTION.

### INSOLVENT.

See ORPHANS' COURT, 3. LIMITATIONS, 8. HUSBAND AND WIFE, 2.

1. The trustee of an insolvent debtor, cannot sustain an action, in right of the insolvent, without having first given bond.—*Immel v. Stoeper*, 262.
2. A bond executed with security, and filed upon the trial of the cause, is not sufficient.—*Ibid*.
3. In the case of an application for the benefit of the insolvent laws, the decree of the court, "Proceedings quashed by order of the court" is conclusive evidence that the applicant did not comply with the terms of his bond; and the cause of such order cannot be inquired into collaterally.—*Heilner v. Bast*, 267.
4. It is the duty of the applicant to surrender himself to prison, if he fails to comply with all things required by law to entitle him to be discharged.—*Ibid*.
5. *Quere*. Whether the court has power to recommit the applicant, except he has been guilty of fraud.—*Ibid*.
6. After an insolvent bond is forfeited, the issuing of an *Als. Ca. Sa.* by the same plaintiff, upon which the insolvent gave another bond, and was subsequently discharged by law, is not a waiver of his right of action upon the first bond.—*Heilner v. Bast*, 267.
7. The statute of limitations does not run against debts due by an insolvent debtor. Lapse of time, much greater than that allowed by the statute, may raise the presumption of the payment of such debts; but when the debtor returns no fund but a debt to become due on a future contingency, no presumption of payment would arise before the fund came to hand.—*Feather's App.* 322.
8. The trustee of an insolvent debtor, having in his own name sued a mortgage given to the insolvent, obtained a judg-

ment, and issued a *Lev. Fas.* thereupon; by virtue of which the sheriff sold the mortgaged premises, and received the purchase money: *Held*, that in a suit brought against the sheriff, to recover the money from him, he cannot set up as a defence, that the trustee had never given bond as required by the act of Assembly.—*Dean v. Patton*, 437.

### INTESTATE AND DECEDENT.

See SHERIFF SALE, 3. PLEADING, 7, 8, 9. EXECUTORS and ADMINISTRATORS, 1, 2, 3, 4, 5. PRINCIPAL and SURETY, 1.

1. A. leaving several children, devised to his son B. a tract of land, he paying fifty dollars an acre thereof; to his son C. a tract of land, he paying sixty dollars per acre thereof; the amount of money so payable to be equally distributed among all his children. B. took under his father's will, made several payments according to its direction, and died leaving children: his administrators having obtained from the Orphan's Court an order to sell his real estate for the payment of debts, sold the same subject to the payment of the balance of the money due under his father's will: *Held*, that the administrators sold, and the purchaser took nothing but the land, and was not entitled to the interest which B. had in the land of his brother C. under his father's will.—*Hege v. Hege*, 91.
2. A purchaser of land, sold by an administrator, by an order of the Orphans' Court, takes the land discharged of the lien of a legacy.—*M. Lanahan's Exors v. M. Lanahan's Admr.*, 96.
3. In Pennsylvania, where lands are assets for the payment of debts; it is most just to afford the terre-tenant, who is the party to be affected, an opportunity to contest the debt—and the plaintiff may do so.—*Himes v. Jacobs*, 152.
4. J. M. obtained patents for his real estate, and executed to the commonwealth mortgages for the purchase money, and died: administration upon his estate issued to his son. The real estate was divided, appraised, and taken by the son, and the other children, in purparts of unequal quantity and value. It was appraised at its full value without any deduction on account of the purchase money. The administrator paid the purchase money out of the personal estate: *Held*, That the payment was a good one, and the administrator entitled to a credit for it.—*King v. Morrison's Admr.*, 188.
5. Where under proceedings in partition in the Orphans' Court to divide the lands of S. the same was appraised and taken by M. who had married one of the children of S. and who acknowledged recognizances to the other children for their shares: the wife of M. can claim nothing against her husband or a purchaser of

his estate, but the undivided share which descended to her, and which remains specifically in land after all the purposes of distribution have been answered.—*Johnson v. Matson*, 371.

6. An administration account stated and filed in the Register's office, is not a compliance with a recognizance conditioned for the settlement of an account, and upon suit upon that recognizance by one of the heirs of the estate which the administrator represented, he is entitled to recover nominal damages, although the jury may believe that his interest in the estate had been paid to him.—*Commonwealth v. Henderson*, 401.
7. A mortgage unrecorded in the lifetime of the mortgagor, has no preference over other specialty debts, out of the proceeds of the sale by the sheriff of the mortgaged premises, after the decease of the mortgagor.—*Adams' Appeal*, 447.

### JOINT PURCHASERS.

See PARTNERSHIP 4.

1. Joint purchasers, without an agreement of partnership, would not be entitled to the remedies, nor subject to the responsibilities of partners.—*Campbell's Ex'rs v. Colhoun's Adm'rs*, 140.

### JOINT OR SEVERAL LIABILITY.

See EXTINGUISHMENT AND SATISFACTION, 1.

### JUDGMENTS.

See EXTINGUISHMENT AND SATISFACTION,

3. PLEADING, 2. PRACTICE, 1, 7. SHERIFF'S SALE, 1, 2, 9. TERRE TENANTS, 1. TRUSTS, 5, 6, 7. WILLS, 2.

1. The revival of a judgment by an amicable *Scire Facias Post Annam et diem*, creates a lien upon the real property of the defendant, acquired after the entry of the original judgment.—*Clippinger v. Miller*, 64.
2. A *Scire Facias* continues the lien of a judgment upon land, although the occupiers, who are lessees from year to year of the defendant, have not had the writ served upon them.—*Ibid*.
3. M. obtained judgment, in November, 1808, upon which he issued a *sci. fa.* to August term, 1810, to which the plea of payment was put in, and issue joined thereon. His counsel was appointed president judge, and in 1816 a list of causes in which he had been concerned, and among them this, was certified for a special court. On this list the words, "*settled says Mr. Duncan*," were written in the hand-writing of the judge, in the entry of this cause, and again, on another list, certified in 1817, the word "*settled*." Mr. D. was counsel for the defendant, and these entries were never transferred from the trial lists, but, in 1823, they were on motion ordered to

be stricken out, and in 1825, a verdict and judgment rendered for the plaintiff: *Held*, that the lien of the judgment remained, and was not postponed to a judgment obtained against the defendant after these entries had been made, and before they had been stricken out.—*Moore's Adm'rs v. Kline*, 129.

4. A bond, with a warrant of attorney to confess judgment, authorizes the entry of but one judgment: the entry of a second, upon the same warrant, is wholly irregular.—*Ulrich v. Voncida*, 245.
5. The issuing of a *fi. facias* within a year and a day, and a levy upon personal property, subject to former levies, or on personal property as per inventory annexed, or a return of *nulla bona*, does not keep alive the lien of a judgment beyond five years, from the return day of the term to which it is entered.—*Betz's Appeal*, 271.
6. Upon a transcript of the judgment of a justice of the peace, entered as a lien upon land, the five years within which a *scire facias* shall issue, to preserve the lien, must be computed from the first day of the term to which it is entered, and not from the actual date of the entry.—*Ibid*.
7. Executors who were authorized to sell the real estate of their testator, for the payment of certain legacies, sold the same, and afterwards settled their account in the Orphans' Court, by which it appeared there were assets to pay the legacies: the legatees afterwards filed refunding bonds, and brought suits against them as executors, and obtained judgments: *Held*, That such judgments are not liens on the real estate of the executor.—*Mc Culloch v. Sample's Ex'rs*, 422.
8. A judgment entered upon a bond, in the penalty of one hundred dollars, with a warrant to confess a judgment, having a condition thereunder written, that the obligor will pay a fine and bill of costs, then uncertain as to amount, is valid.—*Holden v. Bull*, 460.
9. The order of the Court of Common Pleas, opening a judgment and letting the defendant into a defence, does not destroy the lien from the original date of its entry.—*Steinbridge's Appeal*, 481.
10. The land of D. H. having been levied, and advertised for sale by the sheriff on a *venditioni exponas*, before the day of sale, D. H. by a verbal agreement, transferred the surplus of what the land might sell for, beyond the payment of incumbrances, to L. S. to indemnify him against certain liabilities. Two days after the sale, before the deed was acknowledged, and before all the purchase money was paid, A. D. H. entered a judgment against D. H. and issued a *fi. fa.* with directions to the sheriff to retain the surplus: *Held*, That the judg-



ment entered after the day of sale, was not a lien on the land; and the *f. fa.* could not take the money, because the agreement between D. H. and L. S. was a legal transfer of it before it issued.—*Hahn v. Smith*, 484.

### JUROR.

See JURY.

### JURY.

See ERROR, 18. EVIDENCE, 10. PRACTICE, 4.

1. The court sustained the challenge of a juror on the ground that he was subpoenaed as a witness to impeach the credit of another important witness, who was to give evidence in the cause in which he was called as a juror.—*Chess v. Chess*, 32.

### JUSTICE OF THE PEACE and ALDERMAN.

See COSTS, 1, 6. JUDGMENTS, 6. OFFICE and OFFICER, 1. RECOGNIZANCE, 1.

1. A Justice of the peace, being a judicial officer, must have his court or place of administering justice: and in order to the validity of an amicable judgment upon his docket, the party confessing the same must be before him, and at his office.—*King v. King's Adm'r*, 15.
2. In a case which originated before a Justice of the Peace, from whose judgment there was an appeal to the Common Pleas, where a verdict and judgment was rendered for a sum exceeding the jurisdiction of the justice, this court affirmed the judgment upon the plaintiff's releasing the excess.—*Darrah v. War-nock*, 21.
3. A Justice of the Peace has power to supersede an execution issued by him: and such supersedeas will exonerate the constable from liability.—*Shuman v. Pfoutz*, 61.

### LANDS and LAND OFFICE.

See SURVEYOR, 1. PARENT and CHILD, 2.

1. A precisely descriptive warrant must be followed up with reasonable attention, in order to give title from its date. So of a vague warrant from the time of survey.—*Chambers v. Mifflin*, 74.
2. If an owner of a vague or removed warrant has suffered it to remain unreturned for more than twenty-one years, and during that time has exercised no act of ownership upon the land, the State or any person has a right to consider it as derelict, and whoever purchases and pays for the land, under such circumstances, has a good title.—*Ibid.*
3. Query.—Whether the law is not the same in some cases, as to precisely descriptive warrants.—*Ibid.*

4. An application and survey may be abandoned, but whether or not, depends on the facts to be found by the jury. The payment of fees of office, of surveying fees, and returning the survey, are facts tending to repel the presumption of abandonment.—*Adelman v. Masterson*, 454.
5. An application obtained in 1766, and the land circumscribed by a survey, marked on the ground, but the owner of the survey neglects to have it returned, and refuses to pay the surveying fees, and it continued in this way, until 1785, when a warrant issued for the same land to another: *Held*, That the title of the warrantee shall be preferred.—*Ibid.*
6. When it was proposed to sell depreciation lands at auction, the country was divided into districts, and the lands surveyed. And when the plan of sale by auction, was abandoned, and the country thrown open to settlement or sale in the ordinary mode by warrant from the land office, the country was again divided into districts.—*Evans v. Beatty*, 489.
7. It is understood that the boundaries of these districts of 1792, were not the same, in general, with the boundaries of the depreciation districts.—*Ibid.*
8. If the surveyors of adjoining districts agreed upon the dividing line between their respective districts, or adopted a line already run, such line is to be considered the line between them; although it should be ascertained by survey to give the district less, or more, than by law was allotted to a district; and surveys made by the surveyors of the respective districts within such line, in their respective districts, are good.—*Ibid.*
9. After the lapse of forty years, evidence is not required how such line was run, when run, or by whom: on proof that the respective surveyors had surveyed to such ancient line as a boundary in their respective districts, it should be considered as the regular legal district line.—*Ibid.*
10. The mode of appropriating donations in land, to the officers and soldiers of the Pennsylvania line, in the revolution, adopted after the war.—*Little v. Hodge*, 501.
11. The officers of the government, entrusted with the appropriation of donation land, could at no time give a patent to an applicant for any tract he might ask.—*Ibid.*
12. A patent for a tract of donation land is void, unless given after drawing, and for the number drawn.—*Ibid.*
13. If one man drew a number, and a patent for the land designated by that number were issued to another man, such patent would be void; and the man who drew the number would be entitled to the land.—*Ibid.*

14. Where any officer, or soldier once drew a number, in no event could he, or any one in his name or right afterwards draw another tract.—*Ibid.*
15. Independent of any other evidence, a patent for donation land would be presumptive evidence that the patentee had drawn the number for which such patent had issued to him; although his name did not appear in the comptroller's list, or on the general draft.—*Ibid.*
16. But such presumption would not prevail where his name did appear in another number, and a patent had issued to him for that number, and where the number for which his patent issued, without having his name in it, was subsequently drawn from the wheel in the name of another.—*Ibid.*

#### LANDLORD and TENANT.

See WAY-GOING CROP, 1, 2.

1. A purchaser at sheriff's sale before the deed is acknowledged, has not such a title to the land struck down to him, as will authorize him to give a lease of the premises; and if he does give such a lease to the defendant as whose property it was sold, it will not create the relation of landlord and tenant between them, so as to estop the lessee from disputing the title of the lessor.—*Hall v. Benner*, 402.
2. The general rule of law, that a tenant shall not dispute the title of his landlord, is restricted to cases in which the lease has been fairly obtained, without any misrepresentation, management or fraud.—*Ibid.*

#### LEGACY.

See EXECUTORS and ADMINISTRATORS.

1. To recover a legacy charged upon land, the most approved form, is to bring the suit against the executors and the terre-tenants of the land generally by name.—*M. Lanahan v. M. Lanahan Adm'r* 95.
2. If the terre-tenants have not all been summoned, the plaintiff may pray a writ to summon the person alleged to be terre-tenant; and by this means he may be made a party in the same manner as if he had been summoned or returned by the sheriff, as terre-tenant of the land.—*Ibid.*
3. When a testator, by his will, blends his real and personal estate, he thereby charges his land with the payment of legacies.—*Ibid.*
4. Parol evidence of the declarations of a testator at the time the will was written, may be received in evidence, to support the presumption that the legacy was redeemed by the testator in his lifetime.—*Baily v. Snyder's Ex'rs*, 126.

#### LIBERARI FACIAS.

See EXECUTION.

#### LIENS.

See JUDGMENT. RECOGNIZANCE. WILL, 2

1. Lien creditors are to look to the application of the fund on which they have a lien, at their peril: every thing which a due attention to their interest would have entitled them to receive, being considered as paid by operation of law, as regards the debtor.—*Finney's Adm'r v. The Commonwealth*, 240.

#### LIMITATIONS.

1. Every owner is in possession until some person actually enters on him under an adverse claim, and the statute of limitations begins to run from the time actual adverse possession is taken only.—*Carlisle v. Stiller*, 6.
2. The disability of marriage cannot be added to the prior disability of infancy, to avoid the operation of the statute.—*Ibid.*
3. W. L. owned a tract of land containing two hundred and eighty-seven acres, under an application and survey, of which he never had actual possession, and died in 1784, leaving issue Elizabeth in her minority, who at the age of twenty, married J. C. in April, 1787. At the time of the death of W. L. all but eighty acres of the said tract was held adversely by C. S. under a younger title, by improvement, warrant and survey, who in 1793, bought under another title, the said eighty acres, and took possession, which was held by those claiming under him. J. C. intermarried with E., died in 1815, and to February term, 1818, the said E. C. brought ejectment: *Held*, that as to so much of the tract of which said C. S. had adverse possession at the death of W. L., the said E. C. his daughter, was barred by the statute of limitations, but that as to the eighty acres of which the said C. S. took adverse possession in 1793, she was not barred.—*Ibid.*
4. When the right to the eighty acres, descended to E. C. in law she acquired the possession, and the true construction of the act of limitations gives a feme covert the same time when adverse possession is taken of her lands while she is covert, as it would have given her if there had been adverse possession and the lands had descended to her when she was covert.—*Ibid.*
5. The acknowledgment of a debt, barred by the statute of limitations, by a partner after the dissolution of the partnership, does not operate to revive the debt, and avoid the statute of limitations as to the other partners.—*Sewright v. Craighead*, 137.
6. If one joint purchaser pay the accruing interest on the purchase money, from time to time, a right of action for a moiety of each payment would arise

instantly to the other joint purchaser, which would be barred by the lapse of six years from the payment before suit brought.—*Campbell's Ex'r v. Colhoun's Adm'r*, 140.

7. The redemption of a pawn is not affected by the statute of limitations, which runs only from the conversion of the thing pawned. But a simple contract debt is not protected from the statute, because accompanied with a pledge as a collateral security.—*Boyd's Adm'r v. Wilson*, 216.
8. By the express provision of the insolvent law, the statute of limitations does not run against debts due by an insolvent debtor.—*Feathers' Appeal*, 322.
9. In an action for money had and received, brought to April term, 1825, to recover the amount paid on an article of agreement for the sale of land, which was entered into between the parties, in the year 1800, where nothing had been done by the defendant until 1824, which would entitle the plaintiff to rescind the contract, the statute of limitations is insufficient to bar the action.—*Leinhardt v. Forringer*, 492.

#### MALICIOUS PROSECUTION.

1. An action for maliciously suing out a *capias ad respondendum*, and holding the defendant to bail, is not to be favoured; and clear proof of want of probable cause is necessary to support it.—*Zearing's Executors v. Beachers*, 232.
2. As a general rule, it may be laid down, that such an action cannot be supported, when in the original action, the defendant was obliged to set up some collateral matter by way of defence, which did not appear on the declaration or the face of the instrument declared on.—*Ibid*.

#### MORTGAGE.

See AGENT and FACTOR, 1. ASSIGNEE, 1, 2. FRAUD, 2. INTERSTATE and DECEDENT, 7. SHERIFF'S SALE, 1, 9.

#### MUNICIPAL LAW.

See FOREIGN LAWS and JUDGMENTS, 1.

#### NEW TRIAL.

See PRACTICE, 5.

#### OATH.

See ERROR, 19. SHERIFF'S SALE, 10.

1. The prothonotary of the Court of Common Pleas, has no power to administer the oath required to obtain a writ of error.—*Pumroy v. Lewis*, 14.

OFFICE and OFFICER, *de facto* and *de jure*.

See EVIDENCE, 5. PROTHONOTARIES and CLERKS OF COURTS, 2.

1. Wherever a person has colour of authority, and acts under a commission from the appointing power, but which it may

be alleged has been forfeited by some act, perhaps of an equivocal nature, in all such cases the validity of the commission cannot be examined in a suit in which he is not a party. If a person usurps an authority to which he has no title or colour of title, his acts would be simply void. But a colourable title to an office, can be examined only in a mode in which the officer is a party, and before the proper tribunal, the Supreme Court, in whom by act of assembly all the authority of the King's Bench is vested. It is not therefore competent, when a deposition is offered in evidence, and the commission of the justice of the peace, before whom it was taken, is shown; to prove that, after he was commissioned, he removed out of his proper county, where the deposition was taken, and thereby vacated his office.—*M'Kim v. Somers*, 297.

#### OFFICIAL BOND.

See EVIDENCE, 5. SHERIFF, 1. PRESCRIPTION and PRESUMPTION, 2.

#### ORPHANS' COURT.

See INTERSTATE and DECEDENT, 5. GUARDIAN and WARD.

1. The orphans' court has full power and authority to settle the account of a guardian, and if a balance is found to be in his hands, when the ward arrives at a full age, to compel the payment of it, by attachment or sequestration of the goods or lands of the accountant.—*Bowman v. Herr's Ex'rs*, 282.
2. Upon the death of a guardian before the settlement of his account, his representatives may be cited and compelled to settle it; and the Orphans' Court may exercise the same power to compel them to pay over the balance as they would against the guardian himself.—*Ibid*.
3. A fund belonging to J. O. was brought into the Orphans' Court for distribution.—J. O. had taken the benefit of the insolvent laws in 1800, the assignees then appointed had not qualified, and were dead: *Held*, That the Orphans' Court should retain this fund until the next term of the court at which he was discharged, to have assignees appointed to receive it, but if none were then appointed, it should be paid to J. O.—*Feathers' Appeal*, 322.
4. When an appeal is taken from a decree of the Orphans' Court, it would be wrong in that court to order the money to be paid over under that decree, while the recognizance is writing, or the party bringing in his bail.—*Ibid*.

#### PARENT and CHILD.

1. In all cases of conflicting presumptions on the subject of legitimacy, that in favor of innocence shall prevail.—*Schoer v. Bower*, 450.

2. The alienation of an improvement right by the widow, after the death of her husband, leaving an infant two years of age, will not bar the right of such infant to recover the land, when it arrives at full age, even if the consideration received by the widow should have been applied to the support and maintenance of the child.—*Ibid.*

3. *Query?* Whether there can be an abandonment of a right by an infant.—*Ibid.*

#### PAROL AGREEMENT.

See FRAUDS and PERJURIES, 1, 2, 3.

#### PARTITION.

See COSTS, 4.

#### PARTNERSHIP.

See EXTINGUISHMENT and SATISFACTION, 1. JOINT PURCHASER, 1. LIMITATIONS, 5. PLEADING, 11, 12, 13.

1. Campbell, in 1805, bought of W. 5000 acres of land, at \$4 per acre. The purchase was at a credit of eight years, with interest at three per cent; after which the principal was to be paid at three, six and nine years, reserving six per cent on unpaid balances. By settlement made in 1819, Campbell had paid the interest to W. up to that time, and \$4429 42 on account of principal.—The liability of Colhoun to contribute for the payments of Campbell, whether more or less than his proportional part, would depend on whether the parties had agreed to apportion the profit or loss, which was a fact for the jury.—*Campbell's Ex'rs v. Colhoun's Adm'rs*, 140.

2. There may be a partnership to trade in land, and it may, as in any other case, be limited to purchasing only, the profit and loss being divisible as stock; but this relation does not necessarily or naturally arise from the bare circumstance of a joint purchase.—*Ibid.*

3. If Campbell, as a joint purchaser, paid all the interest as it became due, a right of action for a moiety of each payment, accrued instantly to him against Colhoun, which would be barred by the statute of limitation, when six years had run before suit brought.—*Ibid.*

4. In a case of partnership, the joint effects belong to the firm, and not to the partners, each of whom is entitled only to a share of what may remain, after the payment of the partnership debts, and no greater interest can be derived from a voluntary assignment of his share, or a sale of it on execution.—*Doner v. Stauffer*, 198.

5. A preference exists in favour of the joint creditors of a firm, founded on no merits of their own, but on the equity which springs from the nature of the contract between the partners themselves.—*Ibid.*

6. With the single exception of a joint commission, whenever the partners are not

individually involved, the joint creditors have no preference.—*Ibid.*

7. A separate execution creditor sells not the chattels of the partnership, but the interest of the partner, encumbered with the joint debts; and the joint creditors have therefore no claim to the proceeds.—*Ibid.*

8. Where the separate creditors of each partner proceed by execution, the sale of the partnership effects, under the execution of the separate creditor of one partner, passes the interest of that partner subject to the equity of his co-partner, and the execution creditor is entitled to the price. This equity, together with the remaining interest of the other partner passes by a sale under execution of his separate creditor, where the purchaser of the effects is the same; and this whether the sales be made consecutively, or at the same time.—*Ibid.*

9. *Query.*—What would be the effect where there are separate purchasers of the shares of the respective partners.—*Ibid.*

10. One partner cannot bind his co-partner by deed, although it be given in a transaction in the course of the business of the firm, and the benefit of the contract be received by the firm.—*Hart v. Withers*, 285.

11. Each partner is separately the agent of the rest, with authority to pay the whole or any part of the debts, and payment by him is payment on joint account.—*Tyson v. Pollock*, 375.

#### PATENT.

See LANDS and LAND OFFICE, 11, 12, 13, 15.

#### PAYMENT.

See PRESCRIPTION and PRESUMPTION, 1, 2.

#### PAWN.

1. The redemption of a pawn is not affected by the statute of limitations, which runs only from the conversion of the thing pawned. But a simple contract debt is not protected from the statute, because accompanied with a pledge as a collateral security.—*Boyd's Adm'r v. Wilson*, 216.

#### PLEADING.

See ARBITRATION and AWARD, 1, 2. EXECUTORS and ADMINISTRATORS, 6. GUARDIAN and WARD, 5. INSOLVENT, 1, 8. LEGACY, 1. PRACTICE, 4. HUSBAND and WIFE, 4.

1. When C. came of age, he refused to take the land devised to him, and an agreement was entered into between the guardian of B.'s children, and all the other children of A., that the land devised to C. should be sold, and the money equally divided between them: the land, in pursuance thereof, having been sold by trustees appointed for the pur-

- pose, and the money in their hands, it was held that a suit would not lie against them in the names of the children of B., to recover their share, but must be brought in the name of B.'s administrators, there being debts of B.'s estate yet unpaid.—*Hege v. Hege*, 83.
2. Where suit is brought against the personal representatives of a deceased debtor, with notice to the tenants in possession of the land upon which the debt is alleged to be a lien, and the tenants appear and make defence, they are concluded by the verdict and judgment: although they may not, *in fact* have put in issue the question of lien: and in an ejectment brought by a sheriff's vendee under that judgment against such terre-tenants, they will not be permitted to controvert the lien of such debt.—*Himes v. Jacob's* 152.
  3. It is a rule of pleading that whatever is not contested at the proper time, is conceded.—*Ibid.*
  4. Even where the terre-tenants have been called upon prematurely, still, if they avail themselves of the occasion, and have a fair opportunity to make a full defence, they are concluded.—*Ibid.*
  5. In Pennsylvania, where lands are assets for the payment of debts; it is most just to afford the terre-tenant, who is the party to be affected, an opportunity to contest the debt—and the plaintiff may do so.—*Ibid.*
  6. If an executor, upon the settlement of an account of his testator, allows a credit for a check, this is not such an administration of this part of the assets as will preclude an administrator *de bonis non*, from sustaining an action to recover the amount of the check, which he proved to be a forgery.—*Bank of Pennsylvania v. Jacobs' Adm'r*, 161.
  7. A promise laid in one count, as having been made to the testator in his lifetime; and in another, as having been made to his administrators after his death, is not such a misjoinder of counts, as will be fatal to a general verdict and judgment.—*Ibid.*
  8. Wherever the funds to which the money and the costs are to be applied, or out of which the costs are to be paid, are the same, and the money when recovered would be assets, then the counts may be joined.—*Ibid.*
  9. Where an original action was brought by executors, maliciously and without probable cause, in an action therefor against them, they must be sued in their individual capacity; a writ and declaration, calling them executors, is not mere description or surplage, but is error.—*Zearing's Ex'rs v. Beachore*, 232.
  10. Where an award had been made against the defendants, and by agreement they were let into a defence *on the merits*, without being in any degree prejudiced by the award, in their defence, they are not precluded by the agreement from putting in the plea of *non est factum*, and availing themselves of the fact that the instrument declared on, was executed but by one of a firm only.—*Hart v. Withers*, 285.
  11. But if such agreement had that effect, it would be waived by taking issue on the plea of *non est factum*, instead of moving to have it struck out.—*Ibid.*
  12. When suit is brought against several partners upon a sealed instrument, executed by one for all, the plaintiff cannot recover against the partner who actually executed the instrument alone.—*Ibid.*
  13. A plaintiff who states his case more particularly than is necessary, is not bound to the strict proof of circumstances, merely because they have been unnecessarily set out.—*Sidwell v. Evans*, 383.
  14. A special plea that a domestic attachment, grounded upon the same cause of action, had issued in another county, and is yet pending, is a plea in abatement, and cannot be put in after issue joined upon a plea in bar.—*Eagle v. Nelson*, 442.
  15. The rule is different as regards a popular action: there the pendency of a prior action extinguishes the title of every one else, and necessarily bars the right.—*Ibid.*
  16. A trial, upon the plea of payment, is not a waiver by the defendant of a joinder in demurrer to another plea put in by him; thus when there is a joinder in demurrer, and the defendant is legally entitled to a judgment thereon in his favor, but the cause being tried, upon the plea of payment, and a verdict rendered for the plaintiff, it is error for the court to enter a judgment upon that verdict.—*Willard v. Morris*, 480.

## POSSESSION.

See EJECTMENT, 2. LIMITATIONS, 1.

## PRACTICE.

- See BAIL, 1, 2. CIRCUIT COURT, 1, 2, 3, 4, 5, 6. EQUITY, 1. ERROR, 1, 2, 3, 4, 5, 19. EVIDENCE, 24, 25, 29, 30. INSOLVENT, 2. JUDGMENT, 8, 9. LEGACY, 2. ORPHANS' COURT, 4. PLEADING, 11, 14, 17. PRINCIPAL AND SURETY, 2. ROADS AND BRIDGES, 1. SHERIFF'S SALE, 5, 10.
1. When a judgment is irregularly entered against a defendant, by default of appearance, who being informed of it, neglects or refuses for two terms, and until after a writ of inquiry of damages is executed, to make an application to have the judgment set aside, it will not be reversed on a writ of error.—*Crosby v. Massey*, 229.

2. The time and manner of filing *narr.*, of appearing, pleading and signing judgment, for want of plea, &c. are matters of practice regulated by rules of court: and any one complaining of irregularity therein, must apply for redress as soon as he knows of the injury.—*Ibid.*
3. Generally, if a party goes to trial by consent in a lower court, at an earlier term than he was compellable to do, if he make no objection then, his objection will not avail him afterwards.—*Feathers' Appeal*, 322.
4. Whether a particular cause of action be proper for a *statement*, or whether the statement contains any cause of action; or whether a valid consideration be laid, are points that might be mooted on a motion in arrest of judgment: but they are matters with which the jury have nothing to do.—*Sidwell v. Evans*, 383.
5. The Court of Common Pleas may grant a new trial upon the terms that the defendant shall pay all the costs which have accrued up to the time of trial; and may enforce that rule, by entering judgment upon the verdict against the party refusing to comply with it.—*Deviney v. Reeder*, 390.
6. But if the plaintiff acquiesces in the non-payment of the costs, by proceeding to take testimony on a commission to another State, or proceeds to enforce the payment of them by citation and attachment, he cannot afterwards have judgment by default of the payment of such costs.—*Ibid.*
7. If an execution issue upon a judgment for a penalty upon a condition to pay a fine and bill of costs before the real amount due is ascertained, it will be set aside on a writ of error.—*Holden v. Bull*, 460.
8. When an act of assembly requires *reasonable* notice to be given by one party to the other, ten days, generally, would be sufficient.—*Commonwealth v. Fisher*, 462.

**PRESCRIPTION and PRESUMPTION.**

See **LANDS and LAND OFFICE**, 9, 15, 16.  
**PARENT and CHILD**, 1.

1. The statute of limitations does not run against debts due by an insolvent debtor. Lapse of time, much greater than that allowed by the statute, may raise the presumption of the payment of such debts; but when the debtor returns no fund but a debt to become due on a future contingency, no presumption of payment would arise before the fund came to hand.—*Feather's App.* 322.
2. A presumption of satisfaction from lapse of time, arises in the case of an administration bond; and the computation runs from the period when the money was demandable.—*Dicmer v. Sechrist*, 419.

**PRINCIPAL and SURETY.**

1. The defendant in a judgment on a recognizance for the price of land, taken at a valuation in the Orphans' Court, gives security for the stay of execution allowed by the act of assembly; after which the land is sold by the sheriff, and the money brought into Court. The plaintiff, and other persons entitled, agree that the debts of a deceased brother, who died in the lifetime of the father, should be paid out of his estate as liens, although in point of fact they were not liens, and the proceeds of sale are thus exhausted, and not applied to pay the judgment, which was a lien: *Held*, That the liability of the surety on the recognizance was discharged, and the agreement of the defendant in the judgment to the misapplication of the fund will not, as respects the surety, alter the case.—*Finnicy v. The Commonwealth*, 240.
2. A judgment was obtained against a principal who gave absolute bail to obtain a stay of execution; after which the absolute bail were sued and judgment obtained against them: *Held*, That one of two sureties in the original obligation, who paid one half the debt, is entitled to an assignment of the judgments against the principal and the absolute bail, to enable him to indemnify himself for the amount thus paid.—*Burns v. The Huntingdon Bank*, 395.

**PRIORITY.**

See **JUDGMENTS**, 3, 10.

**PRIVITY OF ESTATE and TITLE.**

See **EQUITY**, 2.

**PROMISSORY NOTES.**

See **BILLS OF EXCHANGE and PROMISSORY NOTES**.

**PROTHONOTARIES and CLERKS OF COURTS.**

See **CIRCUIT COURT**, 2. **ERROR**, 1.

1. The account of a Prothonotary being settled by the accountant officers of the State, to which he files his objections in writing, and takes an appeal to the Common Pleas, upon the trial of the cause he cannot give evidence to support other objections than those made at the time of appeal.—*Porter v. The Commonwealth*, 252.
2. Upon the settlement of such account of a prothonotary out of office, the accountant officer is not confined to the settlement of items embraced, as to date, within the fiscal year.—*Ibid.*

**PURCHASER.**

See **SHERIFF SALE**.

## QUARTER SESSIONS.

1. When the approval of a Court of Quarter Sessions is required by an act of Assembly to an assessment of damages, that court will not readily set aside a report, on the ground that the damages are excessive, yet it may become their duty so to do. It would be a much stronger case which would authorise the Supreme Court to set aside a report on that ground.—*Commonwealth v. Fisher*, 462.

## RATIFICATION.

See SURVEYOR, 1.

## RECOGNIZANCE.

See PRINCIPAL and SURETY, 1.

1. Upon an appeal from a judgment of a Justice of the Peace by the plaintiff, the bail entered into a recognizance, which was taken by the justice in these words, "J. W. bound in a sum to cover all costs," which was held to be void, and upon which there could be no recovery on a *scire facias* against the bail.—*Williamson v. Mitchell*, 9.
2. In an action commenced by *capias*, a short minute of a recognizance of special bail, taken by the clerk of a prothonotary, in this form, "*R. M. held in \$200 coram E. L. for J. H. Prothy*:" Held to be sufficient.—*Moore v. M' Bride's Adm'r* 149.
3. An administration account, stated and filed in the Register's office, is not a compliance with a recognizance, conditioned for the settlement of an account; and upon a suit brought upon that recognizance, by one of the heirs of the estate which the administrator represented, he is entitled to recover nominal damages, although the jury may believe that his interest in the estate had been paid to him.—*Commonwealth v. Henderson*, 401.

## RECORD.

1. A trial list certified under an act of Assembly for holding a special court, forms no part of the record; it is the private paper of the judge, which he has a right to do with as he pleases, and the entries made upon it by him, are intended for his own information.—*Moore's Adm'r v. Kline*, 129.

## REGISTER'S COURT.

See EVIDENCE, 16.

## RELEASE.

See CANALS, 4. EXTINGUISHMENT and SATISFACTION, 1, 4.

## RETRAXIT.

See ERROR, 9.

## RIVERS.

See ROADS and BRIDGES.

## ROADS and BRIDGES.

See CANALS.

1. A practice in the Court of Quarter Sessions of appointing twelve freeholders as reviewers of a road, from which the parties in interest shall strike six, the remaining six being the reviewers, is contrary to the express provision of the law, and erroneous. But when the petitioners for the review pray for the appointment of twelve, and then refuse to strike, because some of the persons appointed are exceptionable, it is not error in the Court of Quarter Sessions to refuse to appoint others in the place of those four, and confirm the view.—*Jonestown Road*, 243.
2. The right of the State to take and use for public purposes, six out of every hundred acres of land sold, is not an implied right but an express reservation: the State infringes upon no private interest, nor does it injure any man, by using this right; the utmost that can be required is, that it should pay for improvements put by the owner on such part as the State should subsequently use.—*Commonwealth v. Fisher*, 462.
3. All below the high water-mark in the channel of the Susquehanna river, is a public highway, and the State has a right to improve it by deepening it, or it may raise dams in it, and thus swell the water; and if in so doing, a spring which rises below high water mark is covered, and which an individual has been accustomed to use, he cannot recover damages therefor, under the act of 9th April, 1827; it is *damnum absque injuria*.—*Ibid*.

## SALE BY ORDER OF ORPHANS' COURT.

See INTTESTATE and DECEDENT, 1.

## SATISFACTION.

See EXTINGUISHMENT and SATISFACTION.

## SCIRE FACIAS.

See JUDGMENT, 1, 2, 6. RECOGNIZANCE, 1. TERR-TENANTS, 1.

## SERVANTS and SLAVES.

"Yeoman" is a sufficient designation of the occupation of the owner of a slave, under the act of 1780.—*Coburn v. Thompson*, 93.

## SHERIFF.

See EVIDENCE, 33. INSOLVENT 8.

1. The neglect or refusal of a sheriff to commit a person convicted of fornication

- tion until the sentence should be complied with, according to the decree of the court, makes him liable upon his official bond, to the mother of the child, for the amount which the person convicted was sentenced to pay to her for its maintenance.—*Snyder v. Commonwealth*, 94.
2. The delivery of the land under a *liberari facias* is the executive duty of the sheriff alone.—*Meredith v. Shewall*, 495.

### SHERIFF'S DEED.

1. The recital in a sheriff's deed, that the sale was made on a certain day, does not estop the grantee from showing by parol, that it was made on a prior day.—*Hall v. Berner*, 402.

### SHERIFF SALE.

See ASSIGNER, 1, 2. INTERSTATE and DECEDENT, 7. JUDGMENT, 5, 6, 10. EXTINGUISHMENT and SATISFACTION, 3.

1. When land is sold upon a judgment, the sheriff must appropriate the money arising from the sale to existing liens, according to their priority, and convey to the purchaser a title free from incumbrances.—*M. Grew v. M. Lanahan*, 44.
2. When a judgment is obtained upon one of several bonds which were secured by a mortgage, and an execution issued thereon, upon which the mortgaged premises are levied, and afterwards sold upon a *venditioni exponas*, before the mortgage is due, the purchaser takes the land discharged of the lien of the mortgage.—*Ibid.*
3. Judicial sales of land, divest all liens, whether general or specific.—*M. Lanahan's Ex'rs v. M. Lanahan's Adm'rs* 96.
4. When a legacy is charged upon land, the sheriff's vendee takes the land, discharged from the lien of the legacy.—*Ibid.*
5. A decree which does not dispose of the whole fund for distribution, under the act of assembly "relative to the distribution of money arising from sheriffs' and coroner's sales," is not a final decree, and an appeal taken from such decree will be quashed.—*Royer v. Tate*, 227.
6. A purchaser at sheriff sale before the deed is acknowledged, has not such a title to the land struck down to him, as will authorise him to give a lease of the premises.—*Hall v. Berner*, 402.
7. Whether a water-right and tilt-hammer are appurtenances to land, and will pass by a sheriff's sale made by virtue of a judgment upon a mortgage of the land, depends upon the facts of the case, and must be submitted as a matter of fact to the jury.—*Ibid.*
8. If the court should decide from inspection of the papers, that such a right would pass as an appurtenant, it would be error.—*Ibid.*

9. A sale of real estate by the sheriff, upon a junior judgment, divests the lien of a prior mortgage upon the same land.—*Willard v. Morris*, 480.
10. Upon an appeal from the decree of the Court of Common Pleas, distributing the proceeds of real estate sold by the sheriff, the affidavit must be made by the party; it is insufficient if made by the attorney.—*Steinbridge's Appeal*, 481.

### SLANDER.

1. Words which impute an offence against morality, are not actionable, unless the offence be indictable, or induce some legal disability. Therefore to say, "J. H. swore a lie before the sessions, and I can prove it by twenty witnesses," is not actionable.—*Harvey v. Boies*, 12, 12.

### SUPREME COURT.

See QUARTER SESSIONS.

### SURETY.

See PRINCIPAL and SURETY.

### SURVEY.

See EJECTMENT, 1. LANDS and LAND OFFICE, 1, 4, 5, 7, 8, 9. SURVEYOR, 1.

### SURVEYOR.

1. When it can be proved or is admitted that a man acted as an assistant surveyor, it is not requisite to shew a special authority.—*Snay v. Smith's Ex'rs*, 1.
2. General reputation that a person was employed as such, or proof that many drafts or field notes remaining in the surveyor's office are in his handwriting, are evidence that he was an assistant.—*Ibid.*
3. The return by a deputy surveyor of a survey made by another, is a ratification of it, and it is immaterial whether there was a precedent authority to make it or not.—*Ibid.*

### SUSQUEHANNA RIVER.

See ROADS and BRIDGES, 3.

### TAXES.

1. A purchaser of unseated lands, sold for the payment of a direct tax, in pursuance of the act of Congress, and having in his possession a deed from the collector, who was authorised to make the sale, has such a right as will authorise him to redeem the same lands, from a person who had purchased them at a treasurer's sale, for taxes, made in pursuance of the act of assembly.—*M. Bride v. Hoey*, 54.
2. The treasurers of the respective counties, are the proper persons to make sale of unseated lands, to pay the arrearages of taxes: and the act of the 13th March,



1815, which gives them this authority, alters and supplies so much of the act of the 3d of April, as required a warrant from the commissioners of the county, to issue to the sheriff or coroner, in case of a sale as aforesaid.—*Mc Coy v. Turk*, 499.

### TERRE-TENANTS.

See PLEADING, 2, 4, 5.

1. It is competent for a terre-tenant, who is brought in by *scire facias* to revive a judgment to show that the original judgment was entered without authority, was fraudulent, or otherwise wholly irregular.—*Ulrich v. Voneida*, 245.

### TIME.

3. When a judgment in ejectment was entered by agreement of the parties, to be released on the payment of a certain sum, on or before a certain day, *time* is of the essence of the contract: and if the money be not paid on or before the day, the judgment becomes absolute and indefeasible.—*Gable v. Hain*, 265.

### TITLE TO LANDS.

See EJECTMENT, 2. EQUITY, 2. FRAUDS and PERJURIES, 1. LANDLORD and TENANT, 1, 2. LIMITATIONS, 2. SHERIFF SALE, 6.

### TREASURER'S SALE.

See TAXES.

### TRIAL.

See NEW TRIAL. PLEADING, 17. PRACTICE, 3.

### TRUSTEE.

See TRUSTS.

### TRUSTS.

See EVIDENCE, 12, 20. INSOLVENT, 1.

1. A gift to a charity shall not fail for the want of a trustee, but vest as soon as the charity has acquired a capacity to take.—*Mc Girr v. Aaron*, 49.
2. Devise—"I give bequeath all my real estate, to wit, &c. to a Roman Catholic priest that shall succeed me in this said place, to be entailed to him and to his successors, in trust and for the use herein mentioned, in succession, forever, &c. &c., and further, it is my will, that the priest for the time being shall transmit the land so left him as aforesaid, to his successor, clear of all incumbrances." &c. *Held*, That the devise was for the maintenance of a priest, but in case of the congregation, and for its benefit alone; and the congregation is entitled to take the profits in the first instance, but subject to a right in the priest to have them applied to his support.—*Ibid*.

3. There is no case where trustees have acted with good faith, and under the advice of counsel, in which they have been held responsible.—*King v. Morrison's Adm'r*, 188.

4. Common skill, common prudence, and common caution, are all that courts require from trustees.—*Konigmacher v. Kimmel*, 207.

5. If a trustee pay a judgment against the debtor out of the trust fund, it is as much satisfied as if the debtor had paid it, and there is no legal or equitable reason for keeping it in force.—*Keller v. Leib*, 220.

6. The trustee cannot, by taking an assignment of it, when it is paid, make it available against the lands of the debtor, conveyed after it was entered, either for a good or valuable consideration: nor can it be made to cover any other debt or demand.—*Ibid*.

7. Query—Whether such trustee can proceed on a judgment against the debtor, (purchased with his own funds,) by execution.—*Ibid*.

### TURNPIKE and TURNPIKE COMPANIES.

See CORPORATION, 1, 2, 3.

### UNSEATED LANDS.

See TAXES.

### VENDOR and VENDEE.

See BARGAIN and SALE, 1. DEED. EXTINGUISHMENT and SATISFACTION, 3. FRAUDS and PERJURIES, 2, 3.

1. The purchase money due the commonwealth, is an incumbrance which may be set up as a defence to the payment of bonds given for land, which the grantor covenanted to convey clear of incumbrances.—*Mc Kennan v. Doughman*, 417.

2. By a sale, conveyance and delivery of possession of land, the grain growing thereon does not pass to the vendee.—*Smith v. Johnston*, 471.

### VERDICT.

See EQUITY.

### WARRANT.

See LANDS and LAND OFFICE, 1, 3.

### WAY-GOING CROP.

1. Where a lease is made for the term of a year, and the tenant sows the land with spring grain, before his term expires, he has no right to the crop of spring grain cut after the term is out; and this whether the lease be for a money rent, or on the shares.—*Demi v. Bossler*, 224.
2. The custom in Pennsylvania, as to the way-going crop, is confined to fall grain, sowed in the autumn, before the expi-

ration of, the lease, and cut in the summer after it determines.—*Ibid.*

WILLS.

See EVIDENCE, 18. EXTINGUISHMENT and SATISFACTION, 4. INTSTATE and DECEDENT, 1. LEGACY.

1. T. B. in his last will made the following devise—"I give and bequeath all my real estate, to wit, &c. to a Roman Catholic priest that shall succeed me in this said place, to be entailed to him and to his successors, in trust, and for the use herein mentioned, in succession, forever, &c. &c. and further, it is my will, that the priest for the time being, shall transmit the land so left him as aforesaid, to his successor, clear of all incumbrances as aforesaid," &c. *Held*, That the devise was for the maintenance of a priest, but in ease of the congregation, and for its benefit alone. And the congregation is entitled to take the profits in the first instance, but subject to a right in the priest, to have them applied to his support.—*McGirr v. Aaron*, 49.
2. C. O. made his will in 1798, and died soon after, seized, as he supposed, of a large real estate. By his will, after disposing of his personal estate, he directed that his land should be occupied in a certain manner for three years, then valued by twelve men, and his son *John* have the right to take it at the appraisal; if he refused, the other children in succession to have the right; if none agreed to take it, it was to be sold by the executors, and in either event the money divided among his heirs. "But the sum of £400 is to be charged on the said estate, and remain in the hands of the purchaser:" the interest on this sum he directed to be paid to his wife, and at her death this sum to be divided among his three eldest children or their heirs; "and as touching the money arising from my land and estate, I give and bequeath to my son J. O. first and foremost, £1000, because he is my only son, along with his share which he shall have with my other children." His personal estate

was exhausted, and his real estate sold on execution within two years after his death; a balance of £400 in 1801 was decreed to be put to interest, and the interest paid the widow. Widow died in 1803, and in 1814 a *scire facias* was issued upon the judgment given to secure the £400, in which a verdict was rendered in 1826, and the proceeds brought into the Orphan's Court for distribution, in 1828: *Held*, That J. O. was not entitled to be paid out of this fund his legacy of £1000; but that he took, as to this an equal share, as one of the "three oldest children" of the testator, that his interest in the fund was personal, not real estate, and a judgment against him no lien on it.—*Feather's Appeal*, 322.

WITNESS.

See EVIDENCE, 4, 7, 8, 9, 10, 11, 24.

1. In a suit brought by the administrators of a deceased's estate, to recover the purchase money of land sold by them in pursuance of an order of the Orphan's Court, one of the heirs of that estate, who had at the bar, upon the trial of the cause, released all his interest in the estate to another of the heirs, is a competent witness for the plaintiffs.—*Cox v. Norton*, 412.
2. An attorney-in-fact is a competent witness to prove, that a settlement made with him for his principal, upon which he executed a release to the party, was obtained by a misrepresentation of the truth.—*Irwin's Adm'r v. Allen*, 445.
3. The sheriff is a competent witness to prove the words, "proceedings stayed by plaintiff's attorney," which had been endorsed on a writ of *liberari facias*, and signed by the sheriff and which were struck out or erased by a line run through them, though still legible, were his return to that writ, and that he had not struck them out.—*Meredith v. Shewall*, 495.

WORDS.

See SLANDER.

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